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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-511

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

v.

ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA; RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA; and FEDERAL POWER COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 19, 1973

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Indiana & Michigan Electric Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceeding on May 25, 1973. A Petition for Rehearing, filed by petitioner, was denied on June 21, 1973.

Opinion and Order Below

The opinion of the Court of Appeals, not yet reported, and the order denying rehearing are reproduced in the Appendix,[1] at 1a and 26a, respectively.

[1] Citations with the suffix "a" are to the Appendix hereto.

Jurisdiction

The opinion and judgment (24a) of the Court of Appeals were entered on May 25, 1973. A timely petition for rehearing, filed by petitioner on June 8, 1973, was denied on June 21, 1973. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. This Court's decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), amplified in *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), established the conditions under which a public utility may file with the Federal Power Commission higher rates under existing tariff-and-service agreements. Does not the decision below conflict so sharply with those decisions and introduce such confusion into the well settled procedure for the establishment and changing of rates, subject to Commission supervision, as to require the interposition of this Court?

2. When the court below determined to reverse an order of the Federal Power Commission on the basis of facts and theories which had not been litigated before the Commission, was not the court required to remand the proceedings to the Commission, pursuant to §313(b) of the Federal Power Act, for findings of fact by the Commission?

Statutes Involved

This petition involves issues which are required to be resolved under Sections 205, 206, and 313 of the Federal Power Act, pertinent portions of which are set out in the Appendix hereto (50a).

Statement of the Case

The petitions for review below were filed pursuant to §313(b) of the Federal Power Act (the Act). No evidentiary proceedings were had before the Federal Power Commission (Commission); the entire record before the Commission consisted of pleadings, motions and responses thereto.

Indiana & Michigan Electric Company (I&M), a subsidiary of American Electric Power Company, Inc., is an electric utility engaged in the generation, transmission and distribution of electric energy for sale both at wholesale for resale and at retail. Richmond and Anderson[2] each operate municipal electric utility departments which, pursuant to service agreement, purchase electric energy at wholesale for distribution to the community. I&M supplies all of Anderson's requirements and part of Richmond's requirements. I&M's service agreements with Richmond and Anderson do not specify a "fixed rate" at which electric energy is sold. Rather, the price term in each agreement refers to a separate "tariff", a "common practice" (8a), and provides for changes in that tariff.

A. The I&M and Anderson Service Agreement.

On April 17, 1957, I&M and Anderson made the service agreement now in force.[3] The price term provides as follows:

> "The Customer [Anderson] hereby agrees to pay the Company [I&M] monthly for electric energy

[2] The municipal electric utility department operated by Anderson, Indiana is known as "Anderson Power & Light of the City of Anderson, Indiana" and that operated by Richmond, Indiana is known as "Richmond Power & Light of the City of Richmond, Indiana."

[3] The service agreement has been supplemented in respects not relevant here.

> delivered hereunder at the rate and under the provisions of the regularly filed and published tariff selected by the Customer and known as Tariff I.P. (a copy of which is attached hereto) [4], as long as said tariff is in effect; and in the event said tariff is replaced by a new tariff incorporating higher or lower rates than those stipulated herein, the Company will continue to furnish service as stipulated in the contract and the Customer will pay for such service at the higher or lower rates from and after the date when such rates are made effective. Should the new tariff incorporate higher rates, the Customer has the option of cancelling the contract prior to its expiration date provided notice of cancellation is furnished the Company within 15 days after the first billing date of the higher rates."

When this service agreement was made, the Commission had not yet established its jurisdiction over the transaction (18a); thus the agreement was not filed with the Commission. It was, as hereafter explained, later so filed.

B. The Assertion of Commission Jurisdiction.

In 1963 the Commission initiated a proceeding under §201 of the Act to determine whether I&M's sales of electricity to its wholesale customers, including Anderson and Richmond, were subject to Commission jurisdiction. *Indiana & Michigan Electric Co.*, 33 FPC 739, 740 (1965). I&M vigorously contested federal jurisdiction. The Commissioner examiner concluded that each transaction was a "sale at wholesale . . . in interstate commerce" within §201 and thus subject to federal jurisdiction. *Id.*, 795. The Commission affirmed and directed I&M to file as rate

[4] As recited in the service agreement, a document labeled "Tariff I.P.", setting forth, among other things, the rates to be paid, is attached to the agreement.

schedules its agreements with its wholesale customers, including Anderson and Richmond. The Commission added:

> "Such rate schedules shall remain effective until and unless superseded by a change filed pursuant to Section 205(d) of the Act and Section 35.3 of the Regulations thereunder, or changed pursuant to order of this Commission." *Id.*, 751

The Commission refused I&M's motion for a stay of the filing requirement pending appeal, *id.*, 33 FPC 1252, 1253. I&M filed with the Commission its wholesale service agreements, reserving its position that the Commission lacked jurisdiction. On appeal, the Commission was affirmed. *Indiana & Michigan Electric Co.* v. *FPC*, 365 F.2d 180, 183 (CA7), *cert. denied*, 385 U.S. 972 (1966).

C. The I&M and Richmond Service Agreement.

While judicial review of the Commission's jurisdictional decision was being initiated, I&M and Richmond on November 15, 1965 made the service agreement now in force under which I&M supplies a part of Richmond's energy requirements. The price term of that agreement provides as follows:

> "The Customer [Richmond] hereby agrees to pay the Company [I&M] monthly for electric energy delivered hereunder at the rate and under the provisions of Company's Tariff I.P. as regularly filed with the Public Service Commission of Indiana, said tariff being selected by the Customer, as long as said tariff is in effect; and in the event said tariff is replaced by a new or revised tariff incorporating higher or lower rates than those stipulated in the aforementioned tariff, the Company will continue to furnish service as stipulated in the Agreement and the Customer will pay for such service at the higher or lower rates from and after the date when such

> rates are made effective. Should the new or revised tariff incorporate higher rates, the Customer shall have the option of cancelling the agreement prior to its expiration date provided notice of cancellation is furnished the Company within 15 days after the first billing date at the higher rates."

This service agreement was filed with the Commission, under the reservation previously mentioned.

D. The June 13, 1972 Rate Increase Filing.

On June 13, 1972, I&M filed with the Commission pursuant to §205(d) of the Act supplements to its wholesale rate schedules, with supporting documentation. These supplements increased the rates to wholesale customers.

Richmond and Anderson moved to reject the new rates[5] and later supplemented their moving papers. Before I&M's responses to the supplements were due, the Commission on August 11, 1972, denied the motions, ordered the rates filed, suspended them for five months, and ordered a hearing to determine their lawfulness under regulatory standards. Petitions for rehearing filed by Anderson and Richmond were denied by the Commission on October 6, 1972, the Commission stating that

> "For service subject to this Commission's jurisdiction, the Tariff I.P. on file with the Indiana Public Service Commission is not applicable. We find that the contracts do not preclude the filing of Rate Schedule WS to supersede Tariff I.P. on file with this Commission." (40a).

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[5] Motions to reject on contractual grounds were also made by certain rural electric cooperative customers. When these were denied, separate review proceedings were begun, *Indiana Statewide Rural Elec. Cooperative, Inc.* v. *FPC, petition for review filed,* No. 71-2148, CADC, Dec. 1, 1972, and are currently pending.

E. The Judgment of the Court of Appeals.

On May 25, 1973, the Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Wright, reversed the Commission's orders of August 11, 1972 (28a) and October 6, 1972 (39a) on the ground that I&M's rate increases for Anderson and Richmond were barred under the rule of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The court noted that the price term in both agreements followed "common practice" by referring to "a rate tariff of general applicability" (8a). It construed such agreements to bar rate changes, however. It reasoned that since the agreements called for payment pursuant to Tariff I.P. "as long as said tariff is in effect", and since Tariff I.P. was still "in effect" for certain retail customers, I&M was barred from filing any rate increase except one which came within the current limits of Tariff I.P. Thus, as the court read the service agreements, they guarantee Richmond and Anderson "parity" in rates with any person buying power under Tariff I.P.

Moreover, since Tariff I.P. is the rate applied to some state-regulated sales to retail industrial customers,[6] the court concluded that no change in Richmond's and Anderson's rates could be made until the state regulatory agency, the Public Service Commission of Indiana (PSCI), acted to raise or eliminate Tariff I.P. In other words, PSCI was empowered, in the court's view, to establish a ceiling on the rates which I&M could charge to Anderson and Richmond, despite the fact that I&M's service agreements with them are subject only to federal jurisdiction.

A "competitive squeeze" theory, pressed mainly by Richmond, appears to have influenced the court below to adopt its "parity" construction. The court found as a fact

[6] I&M in fact serves only seven industrial customers under Tariff I.P.

that Tariff I.P. was "the same tariff as that used by I&M for its own industrial retail customers" (15a.). And it also found that the two cities would be unable to compete for such industrial retail customers if the cities had to buy power at a wholesale rate higher than Tariff I.P. The court found that "parity" would relieve this "competitive squeeze" and therefore read "parity" into the agreements, explicitly phrasing its conclusion in terms of the parties' "intent":

> ". . . Anderson, like Richmond, intended to key its rates to those charged by I&M to its own industrial customers in order to protect itself against the same competitive squeeze that concerned Richmond." (22a)
>
> * * * * *
>
> "The parties to both the Richmond and the Anderson contracts intended that the municipal buyers receive electricity under the same tariff that governed I&M's industrial retail customers." (23a)

The court ordered the Commission to reject I&M's filing and to initiate proceedings for the refund of the incremental amounts collected.

Reasons for Granting the Writ

The argument that follows demonstrates: (1) that the ruling of the court below directly conflicts with decisions of this Court; and (2) that the disposition below departs from the accepted and usual course of judicial proceedings, because it is predicated on findings of fact for which there is absolutely no support in the record, findings made solely by the court below on appeal without the benefit of findings by the Commission, as required by law.

POINT I

The decision below conflicts with the holdings of this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958)

This Court, in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* and in *FPC* v. *Sierra Pacific Power Co., supra* (hereinafter jointly referred to as *"Sierra-Mobile"*), ruled that a utility subject to the provisions of the Natural Gas Act or the Federal Power Act has the right "to establish *ex parte,* and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer." *Mobile, supra,* 343. Thus, under *Sierra-Mobile,* only if a utility has made a "fixed rate" contract to provide service and has bargained away its right to change such rate, is the utility barred from altering the rate by unilaterally filing a rate increase under §205.

Despite these clear teachings, this Court, two terms later, was required to reexplain the *Sierra-Mobile* rule, in reversing the court below. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103 (1958) (*Memphis*). *Memphis* involved several similar agreements which, as this Court noted, were typical "tariff-and-service" agreements under which

> "the agreement between buyer and seller does not itself contain a price term, but rather refers to rate schedules of general applicability on file with the Commission." *Memphis, supra,* 115 n.8.

The service agreements in *Memphis* contemplated changes in rates during their term:

> "'All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [the appropriate rate schedule designation is inserted here], *or any effective superseding rate schedules* on file with the Federal Power Commission . . .'," *Memphis, supra,* 105 (italics original).

The Commission accordingly had accepted new rate filings, but, on appeal, the Court of Appeals for the District of Columbia Circuit reversed and ordered them rejected. *Memphis Light, Gas & Water Division* v. *FPC,* 250 F.2d 402 (CADC 1957).

This Court reversed, holding that the court below had "misconceived the import of our decision in *Mobile,*" *Memphis, supra,* 109. The agreements in *Memphis* were "vitally different", *id.,* 110, from those in *Mobile,* this Court explained. Since they made reference to an initial rate schedule but also called for the application of "any effective superseding rate," they put no restriction on the utility's right

> "to change its rates from time to time, subject, of course, to the procedures and limitations of the Natural Gas Act." *Id.*

Thus *Mobile* imposed no bar:

> "In such circumstances there is nothing in *Mobile* which suggests that United was not entitled to file its new schedules under §4(d), or that the Commission had no jurisdiction to consider them under §4(e)." *Id.*

In further distinguishing *Memphis* from *Mobile,* this Court also stated:

> "[U]ntil this case no one connected with the industry seems to have thought that agreements of this sort precluded natural gas companies from changing their rates in accordance with and subject to §4(d) and (e) procedures; and . . . the respondents' present contrary contentions had their sole genesis in a mistaken view of our decision in the *Mobile* case." *Memphis, supra,* 115 (footnote omitted).

Here neither Anderson nor Richmond has ever contended that they had "fixed rate" contracts like those in *Sierra-Mobile,* and the Commission and the court below did not find otherwise (35a, 14a). Just as in *Memphis,* these service agreements specifically provide for changes in rates.[7]

The language of each agreement here could hardly state more explicitly the parties' understanding that service would commence under the rates in the tariff referred to, but that the tariff might be "replaced by a new tariff incorporating higher or lower rates," whereupon the initial tariff would no longer be "in effect". Service would then continue under the new rates, subject to the customer's option to cancel. No conditions at all are placed on the recognized possibility that the initial tariff might be "replaced" by a "new tariff". Yet the court below held that I&M's proposed new rates were barred by contract. In *Memphis,* this Court held that nearly identical words "left [the utility] free to change its rates from time to time," *Memphis, supra,* 110, subject to Commission review.

The ruling below develops a theory which conflicts with the express holding of this Court in *Memphis* by erecting a *Sierra-Mobile* barrier to rate changes under any "tariff-and-service" agreement referring to "a rate schedule of

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[7] The price terms of the Anderson and Richmond service agreements are set forth, respectively, at p. 3 and p. 5 *supra.*

general applicability". Since the court below observed that such agreements are "common practice" (8a), and since this Court in *Memphis* noted that such agreements are "typical" and even required under Natural Gas Act regulations, *Memphis, supra,* 115 & n.8, the impact of the ruling below is broad indeed. It will affect I&M and other utilities subject to federal jurisdiction, as is already becoming apparent. See, *Kentucky Utilities Co.,* Docket No. E-8172 (F.P.C., Aug. 6, 1973) (slip op. at 3), and (F.P.C., Aug. 22, 1973) (slip op. at 2-3); *Gulf States Utilities Co.,* Docket No. E-8121 (F.P.C., Aug. 7, 1973) (slip op. at 5); *Southern California Edison Co.,* Docket No. E-8176 (F.P.C., Aug. 29, 1973) (slip op. at 1).

The "parity" theory, confected by the court below in an attempt to avoid the force of *Memphis,* holds that the contractual references to "Tariff I.P." bound I&M to maintain service throughout the term of the agreement at the same rate at which I&M sells power to its industrial retail customers, since Tariff I.P. supposedly applied to such customers.[8] Thus any rate higher than the current industrial rate, under the parity theory, is unlawful and must be rejected. This analysis of I&M's service agreements is unsupported by any facts in the record, as will hereafter appear (see, Point II, *infra*).

But most important here is the universal applicability of the parity theory, the "plausible explanation" (12a) which the court below accepted. Richmond and Anderson showed merely that they had typical tariff-and-service agreements; argued that the initial tariff was applicable to some other customers; and urged that they had "an interest" in paying no more than those other customers who were served under the same tariff. Their "competitive squeeze" argument, made without any factual support, is

[8] I&M serves approximately 370 industrial retail customers in Indiana, of which only seven are served under Tariff I.P. Other tariffs available to industrial customers include: C.P., Q.P., D.P., D.P.-2, D.P.-3, and E.C.P., all of which are currently on file with PSCI.

only a variation on the universal theme that a customer always has "an interest" in avoiding a rate increase. The reasoning adopted by the court below can therefore be urged with equal force by any party to a typical tariff-and-service agreement to prevent the Commission from accepting for filing rate changes which this Court ruled in *Memphis* are permissible.

This Court rejected similar arguments in *Memphis*. There, the customers argued that their agreement to purchase gas at a designated rate "or any effective superseding rate" permitted a new rate filing only if the Commission first held a hearing under §5(a) of the Natural Gas Act, determined that a new rate should apply, and thus made it "effective" to "supersede" the old rate. Brief of Memphis Light, Gas & Water Division, *et al.*, 49-53. This Court flatly rejected that claim, *Memphis, supra,* 115-16 n.10, holding that the utility had the right *acting alone* to make a new rate "effective", so that it "superseded" the initial rate.

In square conflict with *Memphis,* the decision below holds that rates cannot be raised for Anderson and Richmond unless they are first similarly raised for various third-party industrial customers. Moreover, this new barrier requires I&M first to obtain approval from PSCI for rate increases which are subject solely to Commission jurisdiction. Such additional conditions on the filing of a rate increase are precisely what was rejected in *Memphis* by this Court.

Indeed the effect of the ruling below is to confer jurisdiction upon a state regulatory agency to determine rates for wholesale sales which are not subject to its jurisdiction. But clearly the states have no power to regulate rates in such transactions. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); Cf., *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44

(1955); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 681 (1954). Nor may private agreements be used to vest a state with jurisdiction over sales subject to federal regulation. *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965).

Among its more invidious effects, the opinion below upsets the very uniformity of federal regulation which Anderson and Richmond sought and won in the Commission's 1965 jurisdictional decision.[9]

The "parity" argument adopted by the court below to qualify rights established by *Memphis* has been rejected by the Commission as contrary to industry practice. In *Atlantic Seaboard Corp.*, 28 F.P.C. 860 (1962), the utility filed new gas tariffs applying for the first time different rates for partial requirements purchasers from those for full requirements purchasers. All of the agreements, as in *Memphis*, called for service at a designated tariff "or any effective superseding rate schedule." *Id.*, 862. The hear-

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[9] Anderson and Richmond, as members of the Indiana Municipal Electric Association ("IMEA"), participated in the 1964 proceedings which established Commission jurisdiction. *Indiana & Mich. Elec. Co.*, *supra*, 33 F.P.C. at 748 (1965). IMEA adopted the Commission staff's arguments in favor of federal jurisdiction and stressed in particular the need for national uniformity in rate regulation:

> "The proper forum for effective regulation of the rates at wholesale for resale to Indiana Michigan's municipal purchasers is the Federal Power Commission, and it is in the public interest that jurisdiction be determined and appropriate rate schedules be filed by Indiana Michigan with the Commission at the earliest date.
>
> * * * * *
>
> "Proper rates for wholesale sales within American Electric's system area must be established by the Federal Power Commission. State regulation will necessarily mean different rates to the same class of customer, with accompanying economic disadvantages, even where costs are truly system costs, which should be allocated as such." Brief of IMEA, 2 (August 24, 1964)

ing examiner rejected the filing on the ground that the initial uniform rate had not been effectively "superseded", *id.*, 880-81, since it was still in effect as to some customers. The Commission reversed:

> "It is apparently the form of the filing as separate rate schedules which has given rise to the *Mobile-Memphis* question. While it is undoubtedly true that the [partial requirements] customers of Columbia will have to enter into new service agreements under the new rate schedules, the schedules themselves are covered by the phrase 'or any effective superseding rate schedule,' and there was no need to obtain the consent of the customers to file these tariff changes." 28 F.P.C. at 862.[10]

Thus *Memphis* imposes no "parity" condition on the right to make a new rate "effective" for a particular customer, whether or not the initial rate has been "superseded" as to other customers. Rather it flatly holds that the seller is "left . . . free to change its rates," *Memphis, supra,* 110. The Commission has interpreted the Act, in the light *Memphis,* to permit rate filings such as I&M made, under similar tariff-and-service agreements. On familiar principles, the agency's interpretation of the statute under which it operates should be given great weight. *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); accord: *Power Reactor Development Co.* v. *Electricians' Union,* 367 U.S. 396, 408 (1961); *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 153 (1946); *Gray* v. *Powell,* 314 U.S. 402 (1941).[11]

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[10] This ruling was affirmed on rehearing, 28 F.P.C. 882, and was not challenged in subsequent judicial review, *Lynchburg Gas Co.* v. *FPC,* 336 F.2d 942 (CADC 1964). Significantly, after the 1962 ruling by the Commission in *Atlantic Seaboard,* rejecting the parity theory, the Anderson contract was regularly extended and the Richmond contract was executed.

[11] Nor is the Commission hostile to "fixed rate" contracts or to the rule of *Sierra-Mobile* as the opinion below implies (10a n.8, 15a);

The "parity" theory, embraced by the court bel
plainly conflicts with *Sierra-Mobile* and *Memphis*. T
court's error affects not only this petitioner but countl
other utilities whose agreements, like those here, are typi
of the tariff-and-service agreements found throughout t
public utility industry.[12] The error affects suppliers a
customers alike. It introduces widespread confusion ir
the industry, restricts the contractual rights of utilities a
the statutory authority of the Commission in a way whi
bears no relation to the purpose of the Act, and thus ita
cizes the need for review by this Court.

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rather it takes extreme care to honor rights which have been esta
lished by contract. Thus, in *St. Michaels Util. Comm'n* v. *Easte
Shore Pub. Serv. Co.*, 31 F.P.C. 1161 (1964), the Commissio
enforced a contract which provided that the customer should "aut
matically receive the advantage" of "any changes made in [the Con
pany's] Resale Service Schedule which would reduce the charges t
Customer", *id.*, 1163. In explicit reliance on *Sierra*, the Commissio
directed the seller to give the customer the advantage of its lower ra
schedule which purported to apply to all wholesale customers uncon
ditionally, *id.*, 1164-65.

[12] Following the decision of this Court in *FPC* v. *Southern Calif
Edison Co.*, 376 U.S. 205 (1964), and subsequent similar decisions
hundreds of wholesale electric contracts were filed with the Commis
sion. As chronicled in the Commission's Annual Reports, over 60
companies filed their wholesale contracts with the Commission in
the summer of 1964, 44 FPC ANN. REP. 85n.1 (1964); such filings
increased in 1965, so that 80% of the electric utilities had filed all of
their wholesale contracts, 45 FPC ANN. REP. 86 (1965); and ap-
proximately 350 additional wholesale contract filings were made in
1966, 46 FPC ANN. REP. 90 (1966).

POINT II

The decision below represents a clear departure from the accepted and usual course of administrative review and calls for the exercise of this Court's power of supervision

The Federal Power Act provides in §313(b):

> "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper."

It appeared, during oral argument below, that the "parity" argument, totally unexplored by any of the parties in the proceedings before the Commission, bulked large in the view of the court below and would be a material fact in the court's resolution of the issues posed to it.[13] Counsel for I&M accordingly requested the court to remand these proceedings to the Commission for the taking of evidence on the issue. See, *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608, 611 n.1 (CA2 1965), *cert. denied*, 384 U.S. 941 (1966).

There is nothing on the face of I&M's service agreements with Anderson or Richmond which suggests a covenant by it to maintain its wholesale rates at "parity" with its rates

[13] Anderson, on brief to the court below, had argued, without conceding the fact (Br. at 38 *et seq.*), that if doubt existed as to the application of the *Sierra-Mobile* rule, "the case should be remanded to the Commission for fact-finding . . ."

to retail customers. The court below read "parity" into those agreements without any proper basis for so doing. In an effort to justify its holding the Court below stated as "fact" the following points, among others:

1. I&M sells power to "many" retail industrial customers at Tariff I.P. rates (8a).

2. If Anderson and Richmond can buy power at Tariff I.P. they will be able to offer power to retail industrial customers at prices competitive with I&M (13a).

3. If I&M can charge Anderson and Richmond rates other than Tariff I.P., "I&M could offer a lower price to its industrial retail customers" (13a).

None of these "facts" is supported by any evidence, nor were they even considered by the Commission. Due regard for the fact-finding responsibility of the Commission, under the Act and as a matter of sound administrative procedure, required the court below, as it has done in other cases, to remand the proceeding to the Commission to develop the pertinent facts. In *Portsmouth Gas Co.* v. *FPC*, 247 F.2d 90 (CADC 1957), the court held that judicial review could not begin until

> "the basic facts, about which we cannot speculate, have been found by the Commission.
>
> "We think it essential that the record show the Commission's judgment—and its reasons for reaching it—as to the exact legally effective terms and conditions of the contract, if any, between United Fuel and Portsmouth as the same existed immediately prior to the entry of the order under review. While we may on occasion judicially notice Commission orders, we think it impractical and therefore improper to do so in this case, where the effect or validity of several orders may depend on the nature of the proceedings in which they were entered, and

> where conclusions must be reached, from numerous orders and proceedings and perhaps from the conduct of the parties—conclusions which should be made in the first instance by the Commission." *Id.*, 94.

Accord: *City of Lancaster* v. *FPC*, 252 F.2d 631, 633 (CADC 1958); *American Broadcasting Co.* v. *FCC*, 179 F.2d 437, 444 (CADC 1949).

Here the court of appeals adopted and acted on an "explanation" of the Anderson and Richmond agreements which it characterized only as "plausible" (12a), but which in fact is wholly unsupported by the record. Similar cases show that whether any "competitive squeeze" exists, and whether "parity" will cure it, cannot be assumed but depends on a full analysis of numerous factors which have not been touched on here. *Shrewsbury Municipal Light Department* v. *New England Power Co.*, 32 F.P.C. 373, 377 (1964); *Duke Power Co.*, Docket No. E-7557 (F.P.C., Feb. 2, 1972) (slip op. at 24-27), *aff'd and modified on other grounds* (F.P.C., Dec. 18, 1972) (Opinion No. 641). Moreover, while Richmond on brief to the court below mentioned its "104 industrial customers", Richmond Reply Br. at 24, and its hopes of attracting "new industrial loads", *id.*, it totally refrained from stating whether *any* such customers are or might be served under rates similar to Tariff I.P. If not, Richmond's argument for rate parity would, of course, collapse. But on this record, such facts are totally unknown, and the opinion below lacks any underpinning.

One other "fact" may have swayed the court below, although it concerns only Richmond and would not explain the Anderson holding. The court found that when the Richmond agreement was made the parties had "full knowledge" that the Commission had jurisdiction over the sale[14] even though the issue was still in litigation. Thus,

[14] In so doing, the court erroneously cited (11a) a Commission finding which did not involve the Richmond contract (compare, 34a), and then rejected the finding as "factually incorrect" (11a).

the court read the term calling for payment at "Company's Tariff I.P. as regularly filed with [PSCI]" as evidence of an intent to keep rates in "parity" with the state-regulated Tariff I.P. (12a) There is no evidence of the parties' knowledge or intent in this case. Moreover, the reference to a tariff which was "regularly filed" with the state commission needs no such complex explanation. The language merely recites compliance with Indiana law, which only permits public utilities to charge rates which are currently on file, see, IND. ANN. STAT. §§54-313, 54-319. Thus it simply shows that the agreement is lawful; if the rate had not been so filed, performance of the agreement might be enjoinable at the instance of a taxpayer. *Rice* v. *City of Indianapolis*, 183 Ind. 203, 108 N.E. 584 (1915).

I&M's showing, both in its original presentation and on motion for reargument, that there is a total absence of factual basis for the "parity" theory clearly established "reasonable grounds", §313(b), requiring a remand to the Commission for fact-findings. Prior to the Commission's August 11, 1972 order, no party had claimed that these typical tariff-and-service agreements were intended to create "parity" between wholesale and industrial rates. Richmond, in its petition to the Commission for rehearing, made the wholly new contention that its agreement "guaranteed that for a period of at least ten years it would pay no higher rates than I&M's retail industrial customers."[15] It offered no proof. Under Commission rules I&M was precluded from responding to Richmond's new claim, 18 C.F.R. §1.34(d) (1973), and the Commission's order of October 6, 1972, denying Richmond's petition for rehearing, made argument on the point unnecessary. Fair

[15] Anderson never made a "parity" argument until it filed its reply brief with the court below, and then its argument was at best subliminal, Anderson Reply Br. at 11. Certainly its late claim was not the equivalent of a Commission finding.

practice (see, Administrative Procedure Act, 5 U.S.C. §554(b)(3)) forbids the Commission to dispose of a case on a new theory on which a party has had no opportunity to present evidence, *American Louisiana Pipe Line Co.* v. *FPC*, 344 F.2d 525 (CADC 1965); *Hill* v. *FPC*, 335 F.2d 355 (CA5 1964); *Bel Oil Corp.* v. *FPC*, 255 F.2d 548 (CA5 1958); *a fortiori* a reviewing court cannot do so. But the error here is even more striking: it is based both on a new theory and on purported facts which are not even in the record. Nothing justified the court in dignifying Richmond's tardy claim to "parity" as if it were a finding of fact by the Commission. If the court saw any substance in the "parity" theory, it had no choice but to remand for findings on the points it thought pertinent:

> "When the court's view of law or policy differs from that of the agency, the agency's findings often fail to answer the questions the court deems crucial, and the only proper disposition the court can make of the case is a remand to the agency so that the needed answers can be supplied." 2 K. C. DAVIS, ADMINISTRATIVE LAW TREATISE 436 (1958).

This Court recently stressed the importance of this principle of orderly administrative review in its summary reversal in *FPC* v. *United Gas Pipe Line Co.*, 393 U.S. 71 (1968). The decision below completely disregards not only the principle but this Court's recent application of it in a case involving the same Commission. Indeed, the court below adopted another novel theory and made original fact-findings in an effort to support its holding. The Commission thought the I&M-Anderson service agreement permitted new rate filings in part because, when it was made in 1957, the parties contemplated rate changes under state regulation (34a). Without disputing that fact, the court said such approach was "beside the point" (20a). Rather, it held, the issue was what procedural requirements the

parties intended would apply to rate changes. It believed that Indiana law permitted rate changes only after investigation, hearing, and final approval by PSCI (22a). It found as a fact that the parties "never contemplated" (20a) that I&M could change its rates "simply by filing a new tariff" (20a; 22a), and it held that the current filing must be rejected.

The court's new legal theory was not urged by any party at any stage of the case, and of course there was no evidence and no agency fact-findings as to the rate changing procedures that the parties "contemplated." Furthermore, the court's findings, made without the aid of counsel, are based on a complete misreading of Indiana law. Rather than prohibiting rate changes without a full hearing and final approval, Indiana law specifically authorizes PSCI to make temporary rate changes simply by finding it "necessary" and declaring an "emergency" to exist. IND. ANN. STAT. §54-712; see also, IND. ANN. STAT. §54-423. Thus it can direct energy buyers to pay an interim surcharge pending hearing and decision on rates. *Boone County Rural Electric Membership Cooperative* v. *Public Service Commission*, 239 Ind. 525, 529-30, 159 N.E.2d 121, 123 (1959); see also, *Twin City Realty Corp.* v. *Clay Utilities, Inc.*, 146 Ind. App. 629, 642-43, 257 N.E.2d 686, 694 (1970).

Moreover, the ruling that PSCI rate changing procedures must be followed now, even though the service agreement is admittedly subject to Commission jurisdiction, engrafts the procedural rules of one agency onto an entirely different agency, and it imports into future Commission proceedings the regulatory law of fifty states, completely sacrificing federal uniformity. The decision below, for instance, has extended the five-month suspension period specified in §205(e) of the Act to include whatever time it takes the Commission to hold a hearing and finally approve the new rates. But the Commission has often

dealt with agreements between utilities and customers who thought they were subject to state regulation. And in such cases it has consistently been able to preserve the expectations of both parties without abandoning the Congressionally mandated plan for the application of federal jurisdiction. See, *e.g., Carolina Power & Light Co.*, 47 F.P.C. 1, 21-25 (1972); *Detroit Edison Co.*, 47 F.P.C. 130, 131 (1972); *Southern California Edison Co.*, 45 F.P.C. 1021 (1971), *appeal pending; Public Service Co. of Indiana*, Docket No. E-7645 (F.P.C., Feb. 25, 1972), *rehearing denied* (F.P.C., May 25, 1972); cf., *Central Telephone & Utilities Corp.*, 45 F.P.C. 971, 973 (1971), *modified on other grounds*, 47 F.P.C. 60 (1972).

The court below not only acted without the help of Commission findings but it also disregarded Commission experience in applying the language of utility agreements, a necessary part of its administrative duties. The reversal of the Commission here represents a clear departure from the accepted and regular course of judicial procedure. This excursion by the court below into new fields without benefit of Commission findings, and contrary to established precedent, requires that this case be reviewed here.

Conclusion

The decision of the court below flies in the face of *Sierra-Mobile* and *Memphis*. The right of utilities to change their rate schedules, when that right is reserved, is now narrowly restricted, contrary to the result contemplated by this Court. Review by this Court is necessary to restore the authority of its decisions in this field.

The court below also insisted upon reaching final decision without findings of fact on the subjects involved, contrary to Congressional mandate. That court likewise disregarded a consistent series of interpretations by the Commission. That court took the bit in its teeth to the point where accepted and usual standards of administrative review were

so completely disregarded that review here is essential to the restoration of order in the process of administrative review.

We take the liberty of suggesting that if this Court should consider the errors below so clear as not to require the Court to place this case on its calendar for oral argument, this matter could be effectively handled by summary reversal, as was done in *F.P.C.* v. *United Gas Pipe Line Co., supra,* with appropriate directions to the court below, including a remand to the Commission for proper findings of fact.

Respectfully submitted,

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September 19, 1973

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1963

RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

INDIANA & MICHIGAN ELECTRIC COMPANY, *Intervenor*

No. 72-2035

ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

INDIANA & MICHIGAN ELECTRIC COMPANY, *Intervenor*

Petitions for Review of an Order of the Federal Power Commission

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Decided May 25, 1973

Sandra J. Strebel, with whom *George Spiegel* was on the brief, for petitioner in No. 72-1963.

Wallace L. Duncan, with whom *Fredrick D. Palmer* was on the brief, for petitioner in No. 72-2035.

Platt W. Davis, III, Attorney, Federal Power Commission, with whom *Leo E. Forquer,* General Counsel, and *George W. McHenry, Jr.,* Acting Solicitor, Federal Power Commission, were on the brief, for respondent.

Peter J. Schlesinger for intervenor. *Edwin L. Weisl, Jr.* also entered an appearance for intervenor.

Before WRIGHT and ROBB, *Circuit Judges,* and DAVIES*, *Senior District Judge.*

Opinion for the Court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge:* Petitioners in these consolidated cases, two municipal power companies, seek review of an order of the Federal Power Commission accepting for filing tariffs tendered by intervenor, a public utility which sells petitioners electric power at wholesale. Petitioners contend that the tariffs, which implemented a rate increase and changed certain conditions of service, were inconsistent with existing contracts between petitioners and intervenor and therefore should have been rejected by the Commission. We agree and reverse.

I. LEGAL SETTING

The Federal Power Act, 16 U.S.C. § 824 *et seq.* (1970), pertinent provisions of which are set forth in the margin,[1] requires in Section 205(c) that public utilities file

* Of the United States District Court for the District of North Dakota, sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

[1] 16 U.S.C. § 824d(c)—(e) (1970):

"(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commis-

all rates and contracts with the Commission for sales subject to the Commission's jurisdiction. Section 206(a) authorizes the Commission to modify any rate or contract

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sion may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the

which it determines, after a hearing, to be "unjust, unreasonable, unduly discriminatory or preferential * * *." Under Section 205(d) changes in previously filed rates must

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Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

16 U.S.C. § 824e(a) (1970):

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affect[ing] such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

be filed with the Commission at least 30 days before they are to go into effect, and under Section 205(e) the Commission may suspend operation of the new rate for up to five months pending a determination of its reasonableness.

The Supreme Court of the United States has held that if a public utility, subsequent to entering into a contract for the sale of power, unilaterally files with the Commission under Section 205(d) a new tariff inconsistent with its contractual obligations, the newly filed tariff is a nullity and does not abrogate or supersede the contract. *See United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

Mobile concerned provisions of the Natural Gas Act virtually identical with the provisions of the Federal Power Act summarized above. There a regulated natural gas company entered into a 10-year contract to supply natural gas at a single fixed price. Subsequently the company, without the consent of the buyer, filed new schedules with the Commission purporting to increase the rate. The Court held that the new schedule "was a nullity insofar as it purported to change the rate set by [the] contract" and "that the contract rate remained the only lawful rate." 350 U.S. at 347. It reasoned that the Natural Gas Act evidenced no purpose to abrogate private rate contracts, and expressly recognized that rates to particular customers may be set by individual contracts. 350 U.S. at 338. This interpretation of the statutory scheme, according to the Court, did not impair the regulatory powers of the Commission, for the Commission could at any time enter into a proceeding to determine that the contract rate was unreasonable and could modify it if it so found. *See* 350 U.S. at 344-345. The *Sierra* case expressly adopted *Mobile's* reasoning and holding in a similar situation arising under the Federal Power Act.

The *Sierra—Mobile* problem came before the Supreme Court again in *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958). There a regulated gas pipeline company had entered into long-term sale agreements. These agreements, unlike the ones in *Sierra* and *Mobile*, did not provide for a single fixed rate, but provided that "[a]ll gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule • • • *or any effective superseding rate schedules*, on file with the Federal Power Commission." 358 U.S. at 105. (Emphasis by the Court.) The seller filed a new rate schedule purporting to increase rates over the last previously filed schedule. The Court held that the newly filed rate was the effective rate, and distinguished the case from *Mobile*. Interpreting the contract between the parties, the Commission had concluded that the seller "bound itself to furnish gas to these customers during the life of the agreements *not* at a single fixed rate, as in *Mobile*, but at what in effect amounted to its current 'going' rate." 358 U.S. at 110. (Emphasis in original.) The Supreme Court, after scrutinizing the record, concluded that there was ample support for the Commission's interpretation of the contract, both factually and legally. *See* 358 U.S. at 114. The Court therefore held that, rather than seeking unilaterally to abrogate its contractual undertaking, the seller in *Memphis* sought "simply to assert, in accordance with the procedures specified by the Act, rights expressly reserved to it by contract." 358 U.S. at 112. It was therefore concluded that the seller could, *consistent with its contractual undertaking*, unilaterally increase its rate by filing a new tariff with the Commission.

The rule of *Sierra, Mobile* and *Memphis* is refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with con-

tractual obligations are invalid.[2] The two cases before us concern application of this rule to two slightly different contractual undertakings. Although the Commission dealt with both cases in the same order, we will consider them separately because of these differences.

II. RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA

Richmond Power and Light (hereinafter Richmond) is a municipally owned electric power company selling electricity to various retail customers. It generates part of the electric energy it sells and purchases the remainder of its requirements from intervenor Indiana & Michigan Electric Company (hereinafter I & M) pursuant to a 10-year contract dated November 15, 1965.[3] I & M is a public utility subject to the jurisdiction of the Federal Power Commission, *see Indiana & Michigan Electric Co.*, 33 FPC 739 (1965), *affirmed*, 7 Cir., 365 F.2d 180, *cert. denied*, 385 U.S. 972 (1966) and its sales to Richmond are subject to the Commission's jurisdiction. I & M also has retail customers of its own in certain parts of Indiana, including many industrial users, and its sales to these customers are not subject to regulation under the Federal Power Act as the Act applies only "to the sale of electric energy *at wholesale* in interstate commerce * * *."[4] Instead, I & M's sales to its retail customers are subject to the jurisdiction of the Indiana Public Service Commission.

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[2] *See also Portsmouth Gas Co.* v. *FPC*, 101 U.S.App.D.C. 99, 247 F.2d 90 (1957); *Shell Oil Co.* v. *FPC*, 3 Cir., 334 F.2d 1002, 1007 (1964).

[3] Under its terms, the contract went into effect on January 1, 1966 and will expire on January 1, 1976 unless altered by agreement of both parties before that date.

[4] 16 U.S.C. §824(b) (1970) (emphasis added).

Since the Federal Power Commission had jurisdiction over I & M's sale of electricity to Richmond, the contract between I & M and Richmond was filed with the Commission under Section 205(c) of the Act, and was designated Rate Schedule FPC No. 58. As is common practice,[5] the contract between I & M and Richmond does not itself contain a price term, but rather refers to a rate tariff of general applicability. In this case the contract provides that electric energy will be provided "at the rate and under the provisions of Company's [I & M's] Tariff I.P. as regularly filed with the Public Service Commission of Indiana, said tariff being selected by the Customer [Richmond], as long as said tariff is in effect • • •." The Tariff IP referred to in the contract is an industrial tariff that I & M negotiated for many of its municipal power company wholesale buyers as well as for many of its larger industrial retail customers. Tariff IP was on file with the Public Service Commission of Indiana when this contract was negotiated. Pursuant to the terms of the Richmond—I & M contract, the same Tariff IP as was then on file with the Public Service Commission of Indiana was attached to the contract when it was filed with the Federal Power Commission and became a supplement thereto. As a result, I & M's industrial retail customers, whose rates were governed directly by the Tariff IP on file with the Indiana Public Service Commission, and Richmond, whose rates were governed by the contract on file with the Federal Power Commission which expressly incorporated the Tariff IP on file with the Public Service Commission of Indiana, all received electric power subject to the same rate formula.

It is conceded that, consistent with the Richmond—I & M contract, I & M had the right to seek rate increases in the

[5] *See United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Water Division*, 358 U.S. 103, 115 n.8 (1958).

Tariff IP on file with the Indiana Commission. The contract language "Tariff I.P. as regularly filed with the Public Service Commission of Indiana" obviously recognizes this possibility. Indeed, the contract expressly provides "and in the event said tariff is replaced by a new or revised tariff incorporating higher or lower rates than those stipulated in the aforementioned tariff, the Company will continue to furnish service as stipulated in the Agreement and the Customer will pay for such service at the higher or lower rates from and after the date when such rates are made effective." Acting consistently with the contract, then, I & M obtained from the Indiana Public Service Commission approval for a new Tariff IP which went into effect on March 29, 1972, implementing a rate increase of about 10 per cent.[6] Richmond also concedes that at this point, consistent with I & M's contractual obligation, I & M could have filed the new Tariff IP as a superseding supplement to the Richmond—I & M contract on file with the Federal Power Commission. But I & M did not take this step. Instead, it filed with the Federal Power Commission, as a superseding supplement to the Richmond—I & M contract, a Rate Schedule WS which effected a rate increase estimated at 45 per cent and also changed certain conditions of service. Richmond's basic position on this appeal is that I & M's filing of Rate Schedule WS was inconsistent with its contractual undertaking to sell Richmond electricity "at the rate and under the provisions of Company's Tariff I.P. as regularly filed with the Public Service Commission of Indiana * * * as long as said tariff is in effect * * *."[7]

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[6] *See* text at p. 22 *infra*.

[7] Richmond also claims that the filing violated a provision of the contract requiring notice and negotiation of any proposed modifications to the contract. The pertinent provision reads:

"At any time from the date of this Agreement either

On its face Richmond's position appears unassailable. But in its order accepting Rate Schedule WS for filing, and in a subsequent order denying a rehearing, the Federal Power Commission has attempted what may charitably be termed an "end run" around that position; the Commission has made an effort to interpret the Richmond—I & M contract in a way that avoids compliance with the command of the *Mobile—Sierra—Memphis* cases.[8]

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party, by giving not less than ninety days written notice to the other party, may from time to time call for a reconsideration of the terms and conditions of this Agreement, including, but without limiting the generality of the foregoing, any change in the facilities to be provided by the parties and/or the operation of such facilities. If such reconsideration is called for, the authorized representatives of the parties shall meet promptly and discuss any changed conditions not foreseen or reasonably foreseeable at the date of this Agreement or at the conclusion of the next previous reconsideration, if any, and any other factors which might cause any inequities. Any agreement modifying such terms and conditions shall specify the date such modification shall become effective."

I & M argues that changes in the appropriate tariff do not fall within this provision since it applies only to "changed conditions not foreseen or reasonably foreseeable at the date of this Agreement" and the contract admittedly foresees changes in Tariff IP. Since we find that I & M's filing violates the contract in other respects, we need not reach this question of contract interpretation.

[8] The FPC has recently revealed its disagreement with the *Mobile* and *Sierra* decisions. In *Carolina Power and Light Co.*, 47 FPC 1, 4 (1972), the Commission stated:

> "The conclusions expressed by [the presiding examiner] and affirmed by this Opinion and order are, in our judgment, the only conclusions available to us, given the current state of the law as interpreted in *Mobile, Sierra,* and *Memphis.* We feel constrained, however, to express our misgivings with respect to these conclusions and to state that in our judgment

The Commission's analysis of the contract begins with this observation:

> "• • • The contract provisions cited • • • indicate that, at the time the agreements were made, the Public Service Commission of Indiana was regarded as the regulatory body with jurisdiction and that rate changes were contemplated by the order or with the approval of that Commission. This Commission's jurisdiction over I & M's wholesale rates has since been asserted and confirmed, *Indiana & Michigan Electric Company*, 33 FPC 739 (1965), affirmed, 365 F2d 180 (CA 7, 1966), cert. denied, 385 US 972 (1966).• • •"

From this, the Commission argues in its brief that

> "It is inconceivable that the parties intended to establish a rate for sales subject to the jurisdiction of the Federal Power Commission. Indeed, it is more likely that the parties intended that the contracts be subject to the ratemaking authority of the appropriate regulatory body. That organization is now the Federal Power Commission and its rate-changing procedures apply in full."

Brief for respondent at 15-16 (footnote omitted).

The problem with this whole argument is that, as applied to the Richmond—I & M contract, its first premise is factually incorrect. True, there was a time when it was assumed that I & M's sales to Richmond were subject to the jurisdiction of the Indiana Public Service Commission rather than the Federal Power Commission. But the contract between Richmond and I & M was entered into on November 15, 1965, and the Federal Power Commission's

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the *Mobile-Sierra* rule is inconsistent with sound regulatory policy. That rule has the effect of limiting our authority under Section 206(a) of the Federal Power Act. * * *"

The FPC reiterated this position in *Philadelphia Electric Co., Susquehanna Electric Co.*, Docket No. E-7726, Aug. 31, 1972, slip op. at 4.

decision holding that it had jurisdiction over I & M's wholesale transactions had issued on April 15, 1965 after a lengthy investigation and hearing.[9] By July 1965 I & M had already commenced filing its wholesale for resale rate schedules with the Federal Power Commission pursuant to Section 205(c) of the Act.[10] The contract was thus entered into with full knowledge that it was the Federal Power Commission, not the Indiana Public Service Commission, which had ultimate jurisdiction over the transactions covered in the contract.[11]

Richmond has given a most plausible explanation why Richmond and I & M, even though knowing that the Federal Power Commission had ultimate jurisdiction over their contract, agreed that the rate for electricity would be governed by the Tariff IP on file with the Public Service Commission of Indiana. According to Richmond, I & M

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[9] *See Indiana & Michigan Electric Co.*, 33 FPC 739 (1965), *affirmed*, 7 Cir., 365 F.2d 180, *cert. denied*, 385 U.S. 972 (1966).

[10] *Indiana & Michigan Electric Co.*, 35 FPC 298 (1966).

[11] I & M argues that, even though the FPC order assuming jurisdiction over I & M's wholesale transactions had issued in 1965, the matter was still strongly contested on appeal, and it was not until the Supreme Court denied a writ of *certiorari* that the matter was considered settled. I & M contends, therefore, that even when Richmond's contract was negotiated the parties assumed that Indiana law rather than the Federal Power Act governed the contract. We find it hard to believe that sophisticated commercial entities such as I & M and Richmond would rest important long-term contractual obligations upon the hope that a court would reverse the FPC's order. In any event, for the reasons discussed in text *infra* at pp. 17-23, even if the parties both assumed in 1965 that Indiana law governed, we would still be constrained to interpret the contract as barring I & M from effecting changes in rates simply by filing a new tariff with the appropriate regulatory authority.

and Richmond are competitors in certain respects: each tries to attract new industrial retail customers to its service territory and to keep existing industrial retail customers. The Richmond—I & M contract ensures that Richmond receives the same rate that I & M charges its own industrial retail customers. In other words, the contract ensures that Richmond, when it resells power to its industrial retail buyers, will be able to price itself competitively with the retail rates I & M offers to its own industrial customers. Absent such protection, I & M could offer a lower price to its industrial retail customers than Richmond would be able to offer, thereby directing new industries away from Richmond's service territory and into I & M's retail service territory. And because of concerns relating to such matters as employment and the property tax base, Richmond, a municipally owned company, had an interest in encouraging industries to locate in its service territory.[12]

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[12] In this respect the relationship between the parties differs from that in *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division, supra* note 5. There the buyers argued that it would be unreasonable to find that they intended, in signing the contract, to permit the seller to change its rate by unilaterally filing a new tariff. *See* 358 U.S. at 115-116 n.10. The Court disagreed since it appeared, *inter alia,* that the buyers were entitled by contract with their customers to pass on any rate increases effected by the seller. *Ibid.* We may assume that such is the case here, although there is nothing in the record on the matter. This factor is not controlling here, however, since Richmond's alleged interest is not in having the rate remain static, but in having it remain in parity with the rates charged other industrial customers of I & M, thereby ensuring that I & M will not be able to have a competitive advantage in encouraging new industrial loads to locate in its service territory. Richmond thus had an interest in barring unilateral rate increases even if it could pass rate increases on to its customers.

The Commission's order next states that this was not a "fixed-rate" contract under the *Mobile* and *Sierra* cases, as it permitted some change in the rates. Since rate changes were contemplated, the Commission argues, the case is properly controlled by the Supreme Court's decision in *Memphis,* where a unilateral filing was effective to change the rates. But this argument misperceives the rationale of the Court's holdings. Because the wholesale transactions regulated under the Natural Gas Act and the Federal Power Act "require substantial investment in capacity and facilities for the service of a particular distributor," both acts provide for individual arrangements between sellers and wholesale buyers, with the relations between the parties established initially by contract. *See United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* 350 U.S. at 339. By insuring that contractual obligations cannot be circumvented by one party to the contract unilaterally filing with the Commission a new tariff inconsistent with those obligations, the *Mobile—Sierra—Memphis* doctrine "preserv[es] the integrity of contracts" and "permits the stability of supply arrangements which all agree is essential to the health of * * * industry." *Id.* at 344. These principles apply whether the parties agree to a specific rate or whether they agree to a rate changeable in a specific manner. In either case the contract is binding, and a unilateral filing is ineffective to change it. The parties to this particular contract each had certain interests it sought to protect in drafting the provision under discussion. I & M, no doubt, wanted to be able to change its industrial tariff to reflect increased costs, inflation, and so forth. Richmond, in turn, wanted to ensure that it would not be placed in a competitive squeeze with respect to resale to industrial customers. The accommodation reached in the contract serves both these interests by permitting I & M to seek changes in its Tariff IP on file with the Public Service Commission of Indiana, but

requiring that Richmond be served under the same tariff as that used by I & M for its own industrial retail customers. We see no reason why the integrity of this contractual undertaking is any less deserving of protection under the Act than one for a single fixed rate.

In its order denying a rehearing, the Commission adverted to Richmond's argument that the contract represented agreement by I & M that its wholesale rates to Richmond would be the same as I & M's retail rates in its Tariff IP on file with the Indiana Commission. The Federal Power Commission answers:

> "This Commission has exclusive jurisdiction over I&M's wholesale sales to * * * [Richmond], and I&M is obligated to charge those rates which are on file with this Commission. This Commission's jurisdiction cannot be limited or avoided by private contract. * * *"

This response is most troubling, for it shows that the Commission simply does not understand, or more likely is not willing to abide by, the fundamental principle of the *Sierra—Mobile—Memphis* decisions. As the Supreme Court emphasized in *Mobile* in response to similar arguments, "[D]enying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest." 350 U.S. at 344. Thus, in our own case, the Commission always remains free, upon its own motion, to enter into a proceeding under Section 206(a) of the Act to determine whether the contract rate between Richmond and I & M is "unjust, unreasonable, unduly discriminatory or preferential * * *."[13] If it so determines, it can order the rate

[13] The FPC has already entered into one investigation of the rates charged by I & M to its municipally owned wholesale customers.

changed. If the Federal Power Commission believes that the Public Service Commission of Indiana is being niggardly in approving rate increases in Tariff IP, it is free to enter into a proceeding to require Richmond or any other wholesale buyer to pay a higher rate. In summary, the Richmond—I & M contract, like the contracts in *Mobile* and *Sierra*, does not limit the Commission's jurisdiction, for under the Act the Commission has no jurisdiction to change contract rates except after determining, through a proceeding under Section 206(a), that the contract rate is unreasonable.

The Commission's brief argues:

> "• • • If public utilities were prohibited from filing rates believed to be consistent with the Federal Power Act, the company might lose revenues to which it is entitled by statute for the period between the termination of suspension and the Commission's ultimate decision on the just and reasonable rate. • • •"

Brief for respondent at 17. But surely this argument proves too much, for it also cuts against the holding in the *Sierra* case. There, after the seller unilaterally filed its rate increase, the Commission accepted the rate for filing

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See Indiana & Michigan Electric Co., supra note 10. An order approving an offer of settlement, to which all parties agreed, was issued some two years later. *See Indiana & Michigan Electric Co.*, 39 FPC 272 (1968). Under the settlement, each municipal wholesale buyer was given the option of switching from its present tariff to a new Tariff MRS, thereby obtaining a rate reduction. Evidently most municipalities availed themselves of this option, since when I & M tendered its Rate Schedule WS for filing in June 1972 the tender indicates that out of 16 municipal wholesale customers the rates of 12 were governed in June 1972 by Tariff MRS. Notably, Richmond and Anderson were among those municipal buyers that did not take advantage of the option and I & M's June 1972 tender states that their rates were still governed by Tariff IP.

but suspended it for five months pending the outcome of a Section 206(a) proceeding to determine its reasonableness. The Commission ultimately found that the new rate was reasonable (thereby implying that the contract rate was unreasonable), but the order embodying this finding did not issue until some nine months after termination of the five-month suspension. Since the Commission had accepted the new rate for filing, the new rate became the effective rate during this nine-month period. The Court expressly held that the filing should have been rejected, as inconsistent with contractual obligations, and that the Section 206(a) determination "can effect no change prior to the date of the order * * *." 350 U.S. at 353. Thus the Court recognized that the contract rate, even if it was ultimately determined to be unreasonably low, remained the only lawful rate until the date of the Commission's order in the Section 206(a) proceeding. Nor is there anything particularly inequitable about this result, since it was the seller after all who, through arm's length negotiation, entered into the contract in the first place. And, as stated in *Mobile,* this result was simply part of the "reasonable accommodation" afforded by the Act "between the conflicting interests of contract stability on the one hand and public regulation on the other." 350 U.S. at 344.

III. ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA

Anderson Power and Light (hereinafter Anderson) is also a municipally owned electric power company selling electricity to assorted retail customers. Unlike Richmond, it no longer generates any electricity but purchases all of its requirements from I & M pursuant to a long-term agreement. In matters relevant to the issues before us, the Anderson—I & M contract is identical with the Richmond—I & M contract except in two respects. First, and most importantly, the Anderson—I & M contract was en-

tered into on April 17, 1957 at a time when both parties to the contract admittedly assumed that the Public Service Commission of Indiana, not the Federal Power Commission, had ultimate jurisdiction over the contract. In addition, the relevant contract language is slightly different. Whereas the Richmond—I & M contract referred to the "Tariff I.P. as regularly filed with the Public Service Commission of Indiana," the Anderson—I & M contract provides, in pertinent part, that I & M will provide electric energy "at the rate and under the provisions of the regularly filed and published tariff selected by the Customer [Anderson] and known as Tariff I.P. (a copy of which is attached hereto), as long as said tariff is in effect • • •." In other respects the Anderson case is identical with the Richmond case. Here too I & M filed with the Federal Power Commission the new Rate Schedule WS purporting to increase Anderson's rates, and here too Anderson claims that since there is a Tariff IP still in effect before the Indiana Public Service Commission I & M's filing violates its contractual commitment to serve Anderson "at the rate and under the provisions of the regularly filed and published tariff • • • known as Tariff I.P. • • • as long as said tariff is in effect • • •."

We do not believe either of the differences between the Anderson contract and the Richmond contract affects the outcome of the case, though we reach that conclusion through reasoning quite different from that used in the previous section to discredit the Commission's interpretation of the Richmond—I & M contract.

We begin our analysis again by reference to the Commission's order accepting I & M's Rate Schedule WS for filing. After recognizing, correctly in this case, that the contract was entered into at a time when it was assumed the Public Service Commission of Indiana had jurisdiction over the transaction, the order notes "that rate

changes were contemplated by the order or with the approval of that Commission." The order then refers to another recently decided case, concerning another Indiana wholesale power contract, wherein the Commission stated:

> "Our review indicates that when read in their entirety, the subject contracts by their express provisions contemplate changes in the rates and charges for electrical power by or with the approval of the Public Service Commission of Indiana. Since 1965 sales under such contracts have been expressly held to be subject to the jurisdiction of the Federal Power Commission. We therefore find that because the contracts contemplate changes in rates and charges by the appropriate regulatory authority, [the seller] is not precluded from filing for an increase in its filed rates, and the rate filing procedures of Section 205 of the Federal Power Act are applicable to this proceeding. The *Sierra* and *Mobile* cases, *supra*, do not therefore apply. *United Gas Pipeline Company* v. *Memphis Light, Gas and Water Division, et al.*, 358 U.S. 103, (1958). We shall therefore deny the motions [to reject the filing]." [14]

The Commission seems to be saying that it is simply interpreting the contract, in light of changed circumstances, to accomplish what the parties intended. And we have no quarrel in principle with this approach to contract interpretation.[15] But the Commission's analysis of what the parties intended in this instance, and its attempt to fit this case within the *Memphis* mold, will not stand scrutiny. The Commission says that the parties contem-

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[14] *Public Service Co. of Indiana, Inc.*, —— FPC ——, —— (Docket No. E-7645, Feb. 25, 1972) (slip op. at 2) (footnote omitted).

[15] *See W. C. Shepherd Co.* v. *Royal Indemnity Co.*, 5 Cir., 192 F.2d 710, 715 (1951); *Pacific Portland Cement Co.* v. *Food Machinery & Chemical Corp.*, 9 Cir., 178 F.2d 541, 551-553 (1949); RESTATEMENT OF CONTRACTS § 235, Comment *e* & Illustration 8, at 324-325 (1932).

plated rate changes "by the order or with the approval of" the appropriate regulatory commission. This may well be true, but it is beside the point. The issue under *Memphis* is not whether the parties contemplated change by the appropriate regulatory authority, for under the law every electric power contract must contemplate such change. Instead, the question is whether the parties contemplated that the seller could unilaterally effect a change in the rate simply by filing a new tariff with the appropriate regulatory agency.[16] And if we begin with the Commission's observation that the parties to the Anderson—I & M contract contemplated that Indiana law rather than the Federal Power Act governed their contract, we can see that the parties never contemplated anything of the sort.

Under Indiana law no change can be made in any public utility rate schedule except upon approval by the Public Service Commission of Indiana.[17] A public utility may file a petition requesting an increase in its own rate,[18] and

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[16] *See United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division, supra* note 5, 358 U.S. at 110.

[17] Change of rates, how made.—No change shall thereafter be made in any schedule, including schedules of joint rates, except upon thirty [30] days' notice to the commission *and approval by the commission* and all such changes shall be plainly indicated upon existing schedules or by filing new schedules in lieu thereof thirty [30] days prior to the time the same are to take effect * * *.

10 BURNS IND. STAT. ANN. § 54-317 (1951 Replacement Vol.) (emphasis added).

[18] Complaint by public utility.—Any public utility may make complaint as to any matter affecting its own rates or service with like effect as though made by any mercantile, agricultural or manufacturing society, body politic or municipal organization or by any ten [10] persons, firms, corporations or associations. Whenever any public utility shall file

the Commission must then proceed with an investigation into the lawfulness of the rates.[19] But no order affecting the rates can be entered by the Commission without a formal public hearing,[20] and no rate change is effected until there is an order by the Commission approving the increase.[21] In other words, no rate could be increased under

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a complaint or petition as to any matter concerning an increase of its own rates, affecting its patrons in any county in which such public utility renders service, the public utility shall publish a notice of the filing of such petition or complaint in a newspaper of general circulation published in such county.

10 BURNS IND. STAT. ANN. § 54-415 (1972 Cum. Pocket Supp.).

[19] Complaints—Investigation and hearing.—Upon a complaint made against any public utility by any mercantile, agricultural or manufacturing society or by any body politic or municipal organization or by ten [10] persons, firms, corporations or associations, or ten [10] complainants of all or any of the aforementioned classes, or by any public utility, that any of the rates, tolls, charges or schedules or any joint rate or rates in which such petitioner is directly interested are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act whatsoever affecting or relating to the service of any public utility, or any service in connection therewith, is in any respect unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or can not be obtained, the commission shall proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, measurements, practice or act, complained of, shall be entered by the commission without a formal public hearing.

10 BURNS IND. STAT. ANN. § 54-408 (1951 Replacement Vol.).

[20] *See* note 19 *supra*.

[21] *See* notes 17 & 19 *supra*.

Indiana law without going through a procedure similar in many respects to the procedure established in Section 206 (a) of the Federal Power Act. The mere act of filing a rate increase did not effect a rate increase under Indiana law. There had to be affirmative approval of the increase by the Public Service Commission, after an investigation and a hearing. Indeed, in the instant case when I & M sought a 10 per cent increase in Tariff IP before the Public Service Commission these procedural requirements apparently were followed. I & M filed an application with the Public Service Commission to increase its rates in July 1971. The matter came on for a hearing before the Public Service Commission in January 1972. On March 24, 1972 the Commission approved the rate increase by order. Only then was it permitted to take effect.

We think that if one is to construe the Anderson—I & M contract, in light of changed circumstances, to reflect as nearly as one can the intentions of the parties to the contract, the only possible result is to construe it as not permitting I & M to change the rate simply by filing a new tariff with the Federal Power Commission. This case, then, is critically different from *Memphis,* where it was evident that the parties to the contract contemplated that the seller could unilaterally change the rate by filing a superseding tariff with the Commission. *See* 358 U.S. at 105, 114-115, & n.9. *See also Pacific Natural Gas Co.* v. *FPC,* 9 Cir., 276 F.2d 350, 351 (1960).

The obvious truth of the matter is that Anderson, like Richmond, intended to key its rates to those charged by I & M to its own industrial customers in order to protect itself against the same competitive squeeze that concerned Richmond. Any uncertainties one might have as to what the contracting parties intended are set to rest by the fact that in 1969, some four years after it had become clear that the Federal Power Commission was the appropriate

regulatory body, I & M tendered to Anderson for its approval a new contract which provided, in terms identical with the Richmond—I & M contract, that electricity would be furnished "at the rate and under the provisions of Company's Tariff I.P. as regularly filed with the Public Service Commission of Indiana * * *."[22]

The parties to both the Richmond and the Anderson contracts intended that the municipal buyers receive electricity under the same tariff that governed I & M's industrial retail customers. While they contemplated changes in Tariff IP, they never contemplated that those changes could be effected merely by I & M's filing a new tariff. As a result, I & M's filing of Rate Schedule WS as a superseding supplement to both contracts was inconsistent with its contractual obligations and those filings should have been rejected. Accordingly, we remand these cases to the Commission with directions to reject I & M's filings and to initiate such proceedings as may be necessary to secure refunds of the incremental amounts paid by Richmond and Anderson to I & M since the time Rate Schedule WS was erroneously allowed to become effective.

So ordered.

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[22] Reply brief of Petitioner Anderson Power and Light, Exhibit A-1, at 3-a. Anderson never approved the tendered contract and it is therefore not binding as such. It is indicative, however, of the intentions of the parties to the 1957 agreement, as manifested in subsequent conduct. *See generally* S. WILLISTON, CONTRACTS § 723 (3d ed. 1961). *See also* RESTATEMENT OF CONTRACTS, *supra* note 15, § 235(e). *Cf.* note 13 *supra.*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1963—September Term, 1972

Filed May 25, 1973

RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

INDIANA AND MICHIGAN ELECTRIC COMPANY,
Intervenor.

No. 72-2035

ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

INDIANA AND MICHIGAN ELECTRIC COMPANY,
Intervenor.

Petitions for Review of an Order of the Federal Power Commission

Before: WRIGHT and ROBB, Circuit Judges, and DAVIES,* United States Senior District Judge for the District of North Dakota.

* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

JUDGMENT

These causes came on to be heard on the petitions for review of an order of the Federal Power Commission and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that these cases are hereby remanded to the Federal Power Commission in accordance with the opinion of this Court filed herein this date.

Per Curiam For the Court

HUGH E. KLINE
Clerk

Date: May 25, 1973

Opinion for the Court filed by Circuit Judge Wright.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 72-1963—September Term, 1972

Filed June 21, 1973

Richmond Power and Light of the City of Richmond, Indiana,

Petitioner,

v.

Federal Power Commission,

Respondent,

Indiana and Michigan Electric Co.,

Intervenor.

No. 72-2035

Anderson Power and Light of the City of Anderson, Indiana,

Petitioner,

v.

Federal Power Commission,

Respondent,

Indiana and Michigan Electric Co.,

Intervenor.

Before: Wright and Robb, Circuit Judges; Davies*, Senior United States District Judge for the District of North Dakota.

* Sitting by designation pursuant to Title 28 U.S. Code Section 292(c).

ORDER

On consideration of intervenor's petition for rehearing, it is

ORDERED by the Court that intervenor's aforesaid petition is denied.

Per Curiam For the Court:

HUGH E. KLINE
Clerk

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: JOHN N. NASSIKAS, Chairman; ALBERT B. BROOKE, JR., and PINKNEY WALKER.

INDIANA & MICHIGAN ELECTRIC COMPANY
Docket No. E-7740

Order Accepting for Filing and Suspending Revised Tariff Sheets, Denying Motions to Reject Filing, Providing for Hearing, Establishing Procedures, Permitting Interventions, Denying Waiver, and Fixing Effective Date

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(Issued August 11, 1972)

Indiana & Michigan Electric Company (I & M) on June 13, 1972, tendered for filing the following tariff changes,[1] each of which was proposed to become effective on July 14, 1972:

(1) First revised sheets No. 7 to 11-3 to the Company's FPC Electric Tariff MRS, under which twelve municipal customers are being served;

(2) Supplements to four rate schedules under which four municipal customers are being served;

(3) Supplements to eight rate schedules under which seven rural electric cooperative customers are being served; and

(4) New FPC Electric Tariff WS, Original Volume No. 1, of the Company.

The proposed changes would increase I & M's revenues from jurisdictional sales and service by approximately

1. See designations in the appendix to this order.

$6,180,000 annually based on the 12-month period ending December 31, 1971, as adjusted. I & M stated that the rate increase is necessitated primarily by the fact that at March 31, 1972, I & M's earnings were insufficient to permit the company to issue any additional long term debt to finance its construction program.

Notice of I & M's proposed changes was issued on June 23, 1972, and was published on June 30, 1972, 37 F.R. 12998. The notice required protests and petitions to intervene to be filed by July 5, 1972. By notice issued July 3, 1972, the date was extended until July 15, 1972, upon the request of Indiana Municipal Electric Association.

A protest against I & M's proposed changes was filed on June 28, 1972, by Coalition for the Environment, Inc., Fort Wayne, Indiana. A letter on behalf of the City of Bluffton, Indiana, in opposition to the proposed rate increase was also received. A letter in protest was received from the Honorable Birch Bayh, United States Senate, on August 7, 1972. Protests and petitions to intervene were filed by the City of Fort Wayne, Indiana, and by the City of Anderson, Indiana,[2] on July 3, 1972, and by a group of municipally-owned electric distributor customers[3] of I & M together

[2] On August 2, 1972, the City of Anderson filed a document entitled "Supplemental Petition to Intervene, Formal Protest and Request for Rejection of Rate Schedules Submitted for Filing" alleging (1) that the proposed tariff changes are discriminatory, (2) that they are not permitted by the City's contract with I & M and should be rejected, and (3) that they should be suspended for five months and a hearing held.

[3] Auburn, Indiana; Avilla, Indiana; Bluffton, Indiana; Columbia City, Indiana; Frankton, Indiana; Garrett, Indiana; Gas City, Indiana; Mishawaka, Indiana; New Carlisle, Indiana; Niles, Michigan; South Haven, Michigan; Sturgis, Michigan; Warren, Michigan.

with the Indiana and Michigan Municipal Distributors Association[4] on July 10, 1972.

Richmond Power and Light of the City of Richmond, Indiana (RP & L)[5] filed on July 3, 1972, a document entitled Protest, Motion to Reject, or, in the Alternative, Request for Hearing and Maximum Suspension Period. RP & L moves to reject I & M's filing on the grounds that it is discriminatory and is contrary to antitrust and other policies and that it violates contracts filed with and approved by the Public Service Commission of Indiana. RP & L also states that the proposed WS Tariff makes no provision for interchange of energy and that

> • • • the Commission pursuant to Section 202(b) of the Federal Power Act should order an interchange agreement between RP & L and I & M similar to that between Gainesville Utility Department and Florida Power Corporation (Protest, pp. 2-3).

RP & L further states that I & M is not permitted by contract to request an effective date prior to final approval of the proposed rate increase by the Public Service Commission of Indiana. In its alternative request, RP & L asks that I & M's proposed tariff changes be suspended for five months and that if a final order is not issued by the end of the five-month period, I & M be ordered to charge for electric service at no more than the rates prescribed by the company's IP Tariff, as approved by the Public Service Commission of Indiana. RP & L adds that Section 205(e)

[4] This is an *ad hoc* association of the group of 13 municipal customers and the Cities of Richmond, Indiana; Fort Wayne, Indiana; and Anderson, Indiana (Cities). This Association also filed on August 7, 1972, a Motion for Suspension of Proposed Rate Increase, alleging that regulations of the Price Commisison require the maximum five months' suspension of I & M's proposed rate increase.

[5] RP & L also filed on August 4, 1972, a telegram reiterating its position, and on August 7, 1972, a "Supplement to Motion to Reject Rate Schedule Filing."

of the Federal Power Act requires suspension for five months unless a final order is issued sooner.

A group of rural electric cooperative customers[6] (Cooperatives) of I & M filed on July 17, 1972, a Protest and Petition to Intervene and for Rejection of Rate Schedules Submitted for Filing. The Cooperatives ask that I & M's filing be rejected on the grounds that it is not permitted by I & M's contracts with them and that the amount of the increase to the Cooperatives exceeds any permissible amount under the economic stabilization program. The Cooperatives rely on *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 US 332 (1956) and *FPC* v. *Sierra Pacific Power Co.*, 350 US 348 (1956) and on the following contract provisions to sustain their first ground:

Article 3B

> Customer agrees to take and pay for the electric capacity and energy delivered to Customer by Company hereunder in accordance with the provisions of Company's Tariff REMC as filed with the Public Service Commission of Indiana, a copy of which tariff is attached hereto as Exhibit A and is hereby made a part of this agreement.

Article 12

> Firm Agreement As to Rates And Charges: Should any change in the rate provided for in ARTICLE 3 hereof be ordered by the Public Service Commission of Indiana, payment for services by Customer to Company as provided for in ARTICLE 3 hereof shall thereafter be made upon the basis of such new rate

[6] Indiana Statewide Rural Electric Cooperative, Inc., Fruit Belt Electric Cooperative, Jay County Rural Electric Membership Corporation, Noble County Rural Electric Membership Corporation, Paulding-Putnam Electric Cooperative, Inc., United Rural Electric Membership Corporation, Wayne County Rural Electric Membership Corporation, and Whitley County Rural Electric Membership Corporation.

as changed and approved by the Public Service Commission of Indiana, provided, however, that in the event of such change in rate, either of the parties hereto shall have the right within a period of ninety days, beginning on the date when such change is ordered by the Public Service Commission of Indiana, to terminate this Agreement by giving to the other party at least sixty days prior notice in writing of its intention so to do.

Company agrees that, in the event the rates, terms or conditions of this agreement are questioned or litigated by others than the parties hereto, including but not limited to Public Officials, Company will jointly and in cooperation with Customer defend the same before any regulatory body or court.

Article 13

After the expiration of said initial term, this Agreement will be renewed automatically for successive renewal periods of two (2) years thereafter, unless written notice of termination is given by either party to the other at least 36 months prior to the expiration of the initial term or any renewal period.

The Cooperatives protest the proposed rate increase on the grounds that it would produce an unreasonable rate of return to I & M and would have unfavorable consequences for the Cooperatives, including possible anticompetitive effects.

On July 18, 1972, I & M filed answers to the pleadings of the Cities. I & M does not oppose permitting them to intervene. I & M does oppose their requests for five-months' suspension of the proposed tariff changes. I & M denies that any of the matters alleged in RP & L's pleading establish any basis for granting RP & L's request to reject the proposed rate schedules.

On August 2, 1972, I & M filed an answer to the Cooperatives' protest and petition. I & M opposes the Cooperatives'

petition for rejection of the proposed rate schedules on the ground that Article 12 of the contracts[7] shows that the parties expressly contemplated and provided for changes in rates. I & M states that the Cooperatives fail to allege any facts or contentions sufficient to warrant suspension of the proposed rates for the maximum period of five months. I & M does not oppose permitting the Cooperatives to intervene in this proceeding.

On July 18, 1972, I & M filed an application for an order fixing July 14, 1972, as the effective date of its proposed rate schedules. The application requests relief, in effect, from a July 3, 1972, letter of the Secretary of the Commission acknowledging I & M's filing and advising the company that:

> The earliest effective date for the increase consistent with [Section 35.13(b)(4)(i)] of the Regulations would be August 13, 1972.

Section 35.13(b)(4)(i) of the Commission's Regulations Under the Federal Power Act requires applicants for rate increases to submit certain data 60 days in advance of the proposed effective date. I & M's tender was made 31 days prior to the proposed effective date of July 14, 1972. The application states that this 60-day filing requirement is unreasonable and unnecessary under the circumstances and that, in any event, it should be waived pursuant to Section 35.11 of the Regulations. The Commission staff responded on July 28, 1972, and suggested that the 60-day filing requirement may be improper because (1) both the Federal

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[7] I & M's answer also quotes the following from Section 6 of the "Other Terms and Conditions" portion of tariff REMC attached to the contracts:

> G. Service shall be furnished and taken under the Company's general rules and regulations on file with the Commission, except to the extent, if any, that the same are expressly modified by the terms and conditions hereinabove provided.

Power Act and the Natural Gas Act require only 30-days' notice of rate changes and (2) it operates in effect as an extension of the statutory provisions for five-months' suspension and 30-days' notice of rate changes (See Section 205(e) and 205(d) of the Federal Power Act, respectively). A response in opposition to I & M's application was filed by the City of Anderson, Indiana, on August 1, 1972, and by RP & L on August 7, 1972.

On August 2, 1972, the Indiana and Michigan Municipal Distributors Association filed a Response to Application for Fixing of Effective Date of Increase. This pleading prays that August 14, 1972, be regarded as the proposed effective date of I & M's tariff changes and that they be suspended for five months. The Association also asks that a phased proceeding be instituted, with the first phase directed to I & M's adjustment to fuel and power costs and the second phase directed to all other issues. This request will be denied because the issues involved in this proceeding are not clearly separable and because phasing this proceeding would impede the most expeditious disposition of it.

The Cooperatives, RP & L, and the City of Anderson, Indiana, have requested that the rate schedules filed by I & M applicable to them be rejected on the ground that the rate changes proposed by I & M are not permitted by their contracts. This Commission does have authority to reject tariff changes which are not permitted by contract, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 US 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 US 348 (1956). The contract provisions cited by the Cooperatives and I & M indicate that, at the time the agreements were made, the Public Service Commission of Indiana was regarded as the regulatory body with jurisdiction and that rate changes were contemplated by the order or with the approval of that Commission. This Commission's jurisdiction over I & M's wholesale rates has since been asserted and confirmed, *Indiana & Michigan Electric Company*,

33 FPC 739 (1965), affirmed, 365 F.2d 180 (CA 7, 1966), cert. denied, 385 US 972 (1966). For the reasons discussed in *Public Service Company of Indiana, Inc.*, Docket No. E-7645 (orders issued February 25, 1972, and May 25, 1972), petition for review filed, *Indiana Statewide Rural Cooperative, Inc.*, v. *FPC*, CADC No. 72-1696, involving similar facts, we find that I & M's contracts with the Cooperatives are not fixed-rate contracts and that I & M's changes applicable to the Cooperatives should not be rejected as contractually barred, *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 US 103 (1958).

RP & L's request that I & M's tariff changes applicable to it be rejected will also be denied. The approval of the Public Service Commission of Indiana is not a prerequisite to the tendered tariff changes by I & M because that Commission does not have jurisdiction. None of RP & L's other allegations are cause for rejection.

The City of Anderson requests rejection of I & M's Rate Schedule WS on the ground that Anderson's 1957 contract with I & M provides for Anderson to be served under Tariff IP as long as Tariff IP is in effect and that Anderson has not agreed to take service under any other schedule. I & M's Tariff IP is applicable to I & M's industrial customers and is therefore on file with the Public Service Commission of Indiana. Tariff IP is also applicable to Anderson, RP & L, and other customers taking service subject to this Commission's jurisdiction and is therefore on file as a contract with this Commission. Neither Anderson nor RP & L alleges that a fixed-rate contract exists. We find that I & M is not precluded from filing the changes in rates, terms and conditions of service as embodied in Rate Schedule WS.

In justifying a proposed effective date 31 days after filing, I & M alleges that increased revenues are necessary

to improve its interest coverage and to permit the issuance of long-term debt. We find that good cause has not been shown for waiver of the 60-day filing requirement of the Regulations. The proposed rates and charges, furthermore, have not been shown to be justified and may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful. It has also been alleged that I & M's proposed tariff changes are contrary to the economic stabilization program and antitrust policies and that interchange of energy should be provided for. It is necessary and appropriate in the public interest and in carrying out the provisions of the Federal Power Act that the Commission enter upon a hearing concerning the lawfulness of the rates, charges, classifications, services, and other provisions contained in I & M's proposed FPC Electric Tariff, and the use thereof deferred as hereinafter provided. I & M's proposed tariff changes will be suspended for five months beginning August 13, 1972, and will become effective subject to refund on January 13, 1973.

The Commission orders:

(A) Pursuant to the authority of the Federal Power Act, the Commission's Rules of Practice and Procedure, and the Regulations under the Federal Power Act, a public hearing shall be held concerning the lawfulness of the rates, charges, classifications, services, and other provisions contained in Indiana & Michigan Electric Company's proposed FPC Electric Tariff and shall commence with a prehearing conference to be held on November 23, 1972.

(B) I & M's application and request for waiver are denied.

(C) Pending such hearing and decision thereon, I & M's proposed tariff sheets are accepted for filing and are suspended and their use deferred until January 13, 1973.

(D) All motions and petitions to reject I & M's filing are denied.

(E) The request of Indiana and Michigan Municipal Distributors Association for phased proceedings is denied.

(F) The above-named petitioners are hereby permitted to intervene in this proceeding subject to the rules and regulations of the Commission: *Provided, however,* that the participation of such intervenors shall be limited to matters affecting rights and interests specifically set forth in their respective petitions to intervene; and *Provided, further,* that the admission of such intervenors shall not be construed as recognition by the Commission that they, or any of them, might be aggrieved because of any order or orders issued by the Commission in this proceeding.

(G) The Chief Examiner or any other designated by him for that purpose (See Delegation of Authority, 18 CFR 3.5 (d)) shall preside at the hearing in these proceedings and shall prescribe relevant procedural matters not herein provided.

(H) At the prehearing conference the direct evidence of I & M and the Commission staff shall be copied into the transcript, subject to appropriate motions, if any, by the parties to the proceeding, and procedures adopted for an orderly and expeditious hearing. On or before November 14, 1972, the Commission staff shall serve its prepared testimony and exhibits, if any. The prepared testimony and exhibits, if any, of intervenors shall be served on or before December 1, 1972. Rebuttal evidence, if any, of I & M shall be served on or before December 15, 1972. Cross-examination of the evidence filed shall commence at 10:00 A.M, on January 2, 1973, in a hearing room of the Federal Power Commission.

By the Commission.

(SEAL)

MARY B. KIDD,
Acting Secretary.

APPENDIX

Indiana & Michigan Electric Company
Rate Schedule Designations

Filing Date: June 13, 1972
Date of Instruments: June 13, 1972

Designations	*Customers*
First Revised Sheets Nos. 7 through 11, Original Sheets Nos. 8-1, 11-1, 11-2, 11-3 to FPC Electric Tariff Original Volume No. 1 (Supersedes Original Sheets No. 7 through 11)	Municipal customers served under tariff
Supplement No. 8 to Rate Schedule FPC No. 27 (Supersedes Exhibit A and Supplement Nos. 5, 6, and 7)	City of Anderson
Supplement No. 6 to Rate Schedule FPC No. 29 (Supersedes Exhibit A and Supplement Nos. 2, 3, and 4)	City of Auburn
Supplement No. 3 to Rate Schedule FPC No. 44A (Supersedes Exhibit A and Supplement No. 1)	United REMC (Rural Electric Membership Corporation)
Supplement No. 3 to Rate Schedule FPC No. 44B (Supersedes Exhibit A and Supplement No. 1)	United REMC
Supplement No. 2 to Rate Schedule FPC No. 46 (Supersedes Supplement No. 1)	Fruit Belt Electric Cooperative
Supplement No. 2 to Rate Schedule FPC No. 48 (Supersedes Exhibit A and Supplement No. 1)	Jay County REMC
Supplement No. 2 to Rate Schedule FPC No. 50 (Supersedes Exhibit A and Supplement No. 1)	Noble County REMC
Supplement No. 2 to Rate Schedule FPC No. 52 (Supersedes Exhibit A and Supplement No. 1)	Paulding-Putnam Electric Cooperative
Supplement No. 2 to Rate Schedule FPC No. 54 (Supersedes Exhibit A and Supplement No. 1)	Wayne County REMC
Supplement No. 2 to Rate Schedule FPC No. 56 (Supersedes Exhibit A and Supplement No. 1)	Whitley County REMC
Supplement No. 5 to Rate Schedule FPC No. 58 (Supersedes Exhibit A and Supplement Nos. 2, 3, and 4)	City of Richmond
Supplement No. 5 to Rate Schedule FPC No. 61 (Supersedes Supplements Nos. 1, 2, 3 and 4)	City of Fort Wayne
FPC Electric Tariff Original Volume No. II	Available to all of above-indicated customers.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: JOHN N. NASSIKAS, Chairman; ALBERT B. BROOKE, JR., PINKNEY WALKER, and RUSH MOODY, JR.

INDIANA & MICHIGAN ELECTRIC COMPANY
Docket No. E-7740

Order Denying Rehearing, Request for Oral Argument, Request for Rejection of Rate Filing, and Motion to Reject Supplementary Pleading

(Issued October 6, 1972)

On August 11, 1972, our "Order Accepting for Filing and Suspending Revised Tariff Sheets, Denying Motions to Reject Filing, Providing for Hearing, Establishing Procedures, Permitting Interventions, Denying Waiver, and Fixing Effective Date" was issued in this proceeding. Applications for rehearing were filed by the City of Anderson, Indiana (Anderson) on September 8, 1972, and by Indiana & Michigan Electric Company (I&M), Richmond Power and Light of the City of Richmond, Indiana (RP&L) and a group [1] of cooperative customers (Cooperatives) of I&M on September 11, 1972.

Anderson and RP&L urge that I&M's filing applicable to them should be rejected on the ground that I&M is obligated to serve them under Tariff I.P. as long as it is in effect. Anderson relies on the following contract language, which is nearly identical to that relied on by RP&L:

> The customer hereby agrees to pay the Company monthly for electric energy delivered hereunder at

[1] Indiana Statewide Rural Electric Cooperative, Inc., Fruit Belt Electric Cooperative, Jay County Rural Electric Membership Corporation, Noble County Rural Electric Membership Corporation, Paulding-Putnam Electric Cooperative, Inc., United Rural Electric Membership Corporation, Wayne County Rural Electric Membership Corporation, and Whitley County Rural Electric Membership Corporation.

> the rate and under the provisions of the regularly filed and published tariff selected by the Customer and known as Tariff I.P. * * * as long as said tariff is in effect; and in the event said tariff is replaced by a new tariff incorporating higher or lower rates than those stipulated herein, the Company will continue to furnish service as stipulated in the contract and the customer will pay for such service at the higher or lower rates from and after the date when such rates are made effective.

Rate Schedule WS containing increased rates was tendered to supersede Tariff I.P. in I&M's rate schedules applicable to service to Anderson and RP&L. RP&L argues further that this contract language represents agreement by I&M that its wholesale rates to RP&L would be the same as I&M's retail rates in its Tariff I.P. on file with the Indiana Public Service Commission.

This Commission has exclusive jurisdiction over I&M's wholesale sales to Anderson and RP&L, and I&M is obligated to charge those rates which are on file with this Commission. This Commission's jurisdiction cannot be limited or avoided by private contract. *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC* v. *Amerada Petroleum Corporation*, 379 U.S. 687 (1965); *J. M. Huber Corp.* v. *FPC*, 236 F.2d 550 (CA3, 1956), cert. denied, 352 U.S. 971 (1957). For service subject to this Commission's jurisdiction, the Tariff I.P. on file with the Indiana Public Service Commission is not applicable. We find that the contracts do not preclude the filing of Rate Schedule WS to supersede Tariff I.P. on file with this Commission.

R P & L also repeats its argument that I & M's filing should be rejected because I & M did not give 90 days' written notice and meet with R P & L to discuss the proposed changes as required by their contract. This ground does not justify rejection because it does not render I & M's

filing either "* * * deficient in form or a substantive nullity," *Municipal Light Boards of Reading and Wakefield, Massachusetts* v. *FPC*, 450 F.2d 1341, 1345 (CADC 1971), cert. denied, 405 U.S. 989 (1972). The applications of Anderson and R P & L for rehearing will be denied.

The Cooperatives request rehearing with oral argument and rejection of the proposed rate schedules applicable to them. Their application for rehearing repeats the arguments for rejection which were fully considered in our August 11 order and attacks our orders in *Public Service Company of Indiana, Inc.*, Docket No. E-7645, appeal pending, *Indiana Statewide Rural Electric Cooperative, Inc.* v. *FPC*, CADC No. 72-1696. The Cooperatives imply that denial of their motion for rejection was based solely on the previous orders in Docket No. E-7645. On the contrary, we ruled on the merits of the Cooperatives' contentions in this proceeding and merely referred to the rationale of the previous orders. The Cooperatives dwell nevertheless on Docket No. E-7645 and draw a distinction between that case and this one on the basis of the following language from Article 12 of their contracts:

> Company agrees that, in the event the rates, terms or conditions of this agreement are questioned or litigated by *others than the parties hereto*, including but not limited to Public Officials, Company will jointly and in cooperation with Customer defend the same before any regulatory body or court. (emphasis added)

Since I & M is a party to the contracts, this language obviously does not have the effect of precluding I & M from proposing rate changes. The Cooperatives' application and, since the Cooperatives' arguments have been adequately briefed and fully considered, their request for oral argument will be denied.

I & M asserts that the Commission has no authority to require a notice in excess of the thirty days specified in Section 205(d) of the Federal Power Act. By Section 35.13(b)(4)(i) of its Regulations issued under Section 309 of the Federal Power Act, the Commission requires the filing of cost of service data 60 days prior to the proposed effective date of increased rates. The rate schedule setting forth the increased rates need only be filed 30 days prior to the proposed effective date. Section 35.2, 35.3 and 35.13 (a), Regulations under the Federal Power Act.

As set forth in *Municipal Light Boards* v. *FPC, supra* at 1354, the 60 day regulation is reasonable and is "designed to enhance the ability of the FPC Staff to make the important threshold decision expeditiously upon the filing of the later statutory 30-day notice, as to whether to order an investigation and hearing or a suspension, or both."

Moreover, I&M's reading of Section 205(d) of the Federal Power Act gives the same meaning to two separate sentences of that section, by asserting that both provisions permit the Commission only to fix a shorter notice period. Section 205(d) reads as follows:

> Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect

and the manner in which they shall be filed and published.

In order to give meaning to all parts of the Section, since the last sentence gives the Commission power to permit less than 30 days notice, the provision in the first sentence properly should be interpreted to permit the Commission in appropriate circumstances to require the filing of requisite data more than 30 days prior to the proposed effective date.

If the Commission has authority to require filing of certain data 60 days prior to the proposed effective date, a suspension of the increased rates for five months thereafter is obviously consistent with Section 205(e) of the Federal Power Act.

In arguing that no regulatory or administrative consideration justifies denial of its request, I&M proposes that rate increase filings be permitted 30 days before the proposed effective date and that any suspension order be issued up to 60 days after the filing date with the suspension period running from the proposed effective date. This proposal is unworkable because the Commission does not have statutory authority to issue a suspension order after a proper proposed effective date. I&M's proposed effective date of July 14, 1972, was improper because it was not 60 days after the filing date of June 13, 1972, and adequate review of I&M's filing by the staff necessitated the full 60-day period.

On September 25, 1972, a "Supplement to Petition of the City of Fort Wayne, Indiana, For Leave to Intervene" was filed. This supplementary petition alleges that I&M is engaged in anti-competitive practices and violations of antitrust laws and specifically that I&M's proposed increased rates have these effects because I&M's retail rates in the vicinity of Fort Wayne are lower. Fort Wayne

requests that I&M's filing applicable to it be rejected. On October 3, 1972, I&M filed a motion for the Commission to reject or refuse to permit Fort Wayne's supplementary petition. Fort Wayne's pleading is actually in the nature of a motion, and we find that it does not state good cause for rejection of I&M's rate filing. We will deny the relief requested by Fort Wayne and I&M's motion.

The Commission further finds:

The grounds for rehearing set forth in the foregoing applications for rehearing present no new facts or principles of law which were not considered in our order of August 11, 1972, or which having now been considered warrant any change or modification of that order.

The Commission orders:

(A) The applications for rehearing filed herein and request for oral argument are denied.

(B) I&M's motion to reject Fort Wayne's "Supplement to Petition for Leave to Intervene" is denied.

(C) Fort Wayne's request that I&M's rate increase filing be rejected is denied.

By the Commission. COMMISSIONER MOODY DISSENTING FILED A SEPARATE STATEMENT APPENDED HERETO.

(SEAL)

KENNETH F. PLUMB,
Secretary.

INDIANA & MICHIGAN ELECTRIC COMPANY
Docket No. E-7740
(Issued October 6, 1972)

MOODY, Commissioner, Dissenting:

On June 13, 1972, Indiana & Michigan Electric Company (I & M) filed proposed rates increasing charges to its wholesale customers. I & M requested an effective date of July 14, 1972, and was advised by our Secretary that pursuant to the 60-day notice provision of Section 35.13(b)(4)(i) of the Regulations, the earliest possible effective date of the proposed rates was August 13, 1972. In response, I & M filed an application requesting either (i) an effective day of July 14, 1972, or (ii) that July 14, 1972, be set as the date from which any suspension of I & M's proposed rates would commence. On August 11, 1972, twenty-eight days after I & M's proposed effective date, the Commission issued an order suspending I & M's proposed rates for five months, with the suspension period commencing on August 13, 1972. In my opinion, that order when issued was, and continues to be, a nullity.

Once proposed rates have become effective this Commission is powerless to suspend the effectiveness of, or otherwise modify, those rates under §205 of the Federal Power Act. Our only recourse is to institute a proceeding under §206(a) of the Act and after hearing determine just and reasonable rates to be thereafter observed and in force. For the reasons set forth below, I believe that:

(i) I & M's proposed rates became effective on July 13, 1972;

(ii) I & M in its application for rehearing provided us with the opportunity to avoid litigating this case while at the same time completely protecting the rights of its customers; and

(iii) The effect of the rejection of that opportunity by my colleagues will ultimately result in the sacrifice of customers' rights at customers' expense for the sake of what I conceive to be an illegal regulation.

My colleagues argue that the §35.13(b)(4)(i) of the Regulations is valid, that it has been reviewed and accepted with apparent approval in *Municipal Light Boards* v. *F.P.C.*, 450 F.2d 1341, 1354 (CADC 1971), cert. denied, 405 U.S. 989 (1972), and further that the interpretation placed by I & M upon §205(d) of the Act renders parts of the Act meaningless. I disagree on both counts.

In *Municipal Light Boards* v. *F.P.C.*, the issue presented to the court was whether the Commission could waive its regulations and permit rates to become effective on less than the required sixty-days notice. No party to the case took issue with the legality of the sixty-day rule, but rather assumed the validity of the rule and addressed their arguments to the question whether or not the question whether [*sic*] the Commission could validly waive its provisions. In this context, Judge Levanthal observed (at 1354) with respect to the sixty-day rule that it is "designed to enhance the ability of the FPC Staff to make the important threshold decision expeditiously upon the filing of the later statutory 30-day notice, as to whether to order an investigation and hearing or a suspension, or both." In my view, the quoted language from *Municipal Light Boards* is not authority for validity of the sixty-day regulation and uttered as it was in the context of an assumption of the validity of the rule does not even rise to the dignity of dicta on the issue before us.

On the second point (for the sake of brevity I will not again reproduce the language of §205(d) of the Act), I agree with the conclusion of my colleagues that "the provisions in the first sentence properly should be interpreted to permit the Commission in appropriate circumstances to

require the filing of requisite data more than 30 days prior to the proposed effective date." However, the reasoning by which one is forced from this conclusion to the companion conclusion (that I & M's construction of §205(d) of the Act gives the same meaning to two separate sentences of that section), is labored. The Commission may, under appropriate circumstances, require a notice period of more than thirty days. Two illustrations from our regulation of the interstate gas industry under identical provisions of the Natural Gas Act come to mind.

First, where there is a *quid pro quo* with the option left to the applicant to choose a 30-day notice period or a longer period with some added benefit to the applicant, there is no prohibition against the longer notice period. For example, our Regulations under the Natural Gas Act provide in pertinent part—

> §154.22 Notice requirement. All tariffs, and contracts or any parts thereof shall be filed with the Commission and posted not less than thirty days nor more than sixty days prior to the proposed effective date thereof. . . .
>
> And §154.63(c) (4). . . . *Provided, however,* that if the proposed rate increase is filed at least 45 days before the effective date proposed therefor and such filing does not comply with the requirements of this section, the natural gas company will be notified of the deficiencies, and if such deficiencies are properly cured within 15 days from the date of such notice, the requisite supplementary material will be deemed to have been filed as of the same date as the initial submittal of the proposed rate increase.

Under this latter provision, the applicant may (and usually does) trade 15 days of additional notice for the opportunity to avoid rejection of its filing for noncompliance with our regulations.

A second illustration of where more than 30 days notice may be imposed is where there is no conflict with a suspension period. Where suspension, if any, and the requisite notice will not prevent the placing of proposed rates into effect for a combined period of not more than six months, the provisions of the Federal Power Act and the Natural Gas Act are satisfied. Although the legislative histories of both Acts are inconclusive on the issue, a report accompanying an amendment to the Natural Gas Act in 1961 read:

> The Commission, with respect to domestic users of natural gas, may suspend the effective date of a new rate filing up to a period of five months, which, together with the 30-day notice period, means a 6-month suspension.

Furthermore, of the analagous section in the Natural Gas Act, the Supreme Court has said:

> It may readily be seen that these requirements [§§4(c) and (d) of the Natural Gas Act] are no more than are necessary to implement §§4(e) and 5(a): the filing requirements are obviously necessary to permit the Commission to exercise its review functions, and the requirement of 30-days advance notice of changes is essential to afford the Commission a reasonable period in which to determine whether to exercise its suspension powers under §4(e).
>
> It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake. . . . This concern was surely a proper one for Con-

> gress to take into account in framing its regulatory scheme for the natural gas industry. . . . , and we think that it do [*sic*] so. . . . by providing in §4 for the earliest effectuation of contractually authorized or othewise permissible rate review. . . . *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113-14 (1958).

The Court implied that the 30-day statutory period is to be used for the Commission review of rate filings and that a longer period would be incompatible with the filing utility's interest in the "earliest effectuation" of rate changes.

For the foregoing reasons, I dissent.

RUSH MOODY, JR.,
Commissioner

Text of Statutes Relied On

Federal Power Act §205, 16 U.S.C. §824d:

"Section 824d. Rates and charges; schedules; suspension of new rates

"(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

"(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regula-

tion, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate

account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

Federal Power Act §206(a); 16 U.S.C. 824e(a):

"Section 824e(a). Power of Commission to fix rates and charges; determination of cost of production or transmission

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

Federal Power Act §313; 16 U.S.C. 825*l*:

"Section 825*l*. Rehearings; court review of orders

"(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State,

municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

"(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of

the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

"(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner

v.

ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA;
RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA; AND
FEDERAL POWER COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

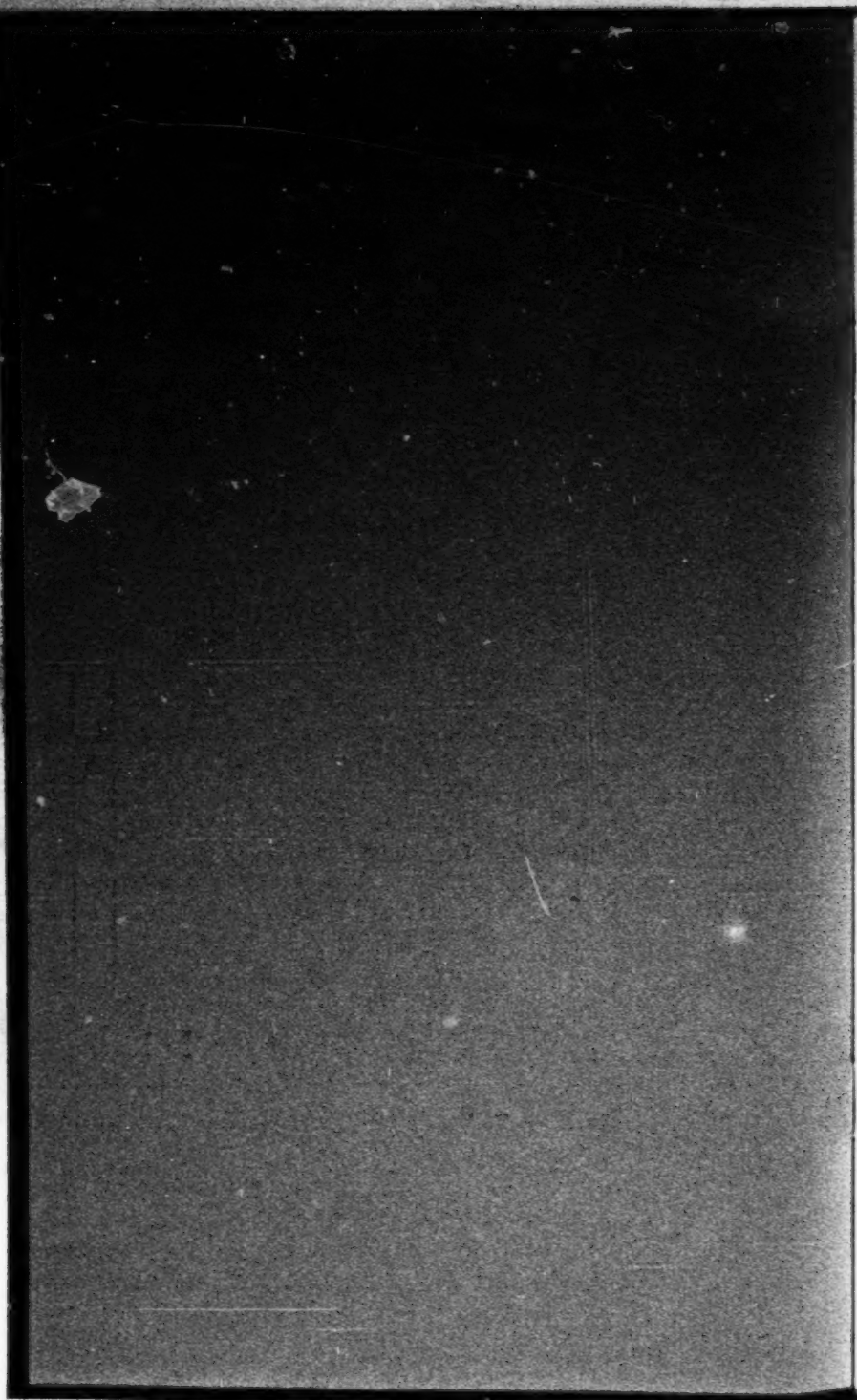
BRIEF FOR RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA, IN OPPOSITION

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October 19, 1973

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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

NO. 73–511

INDIANA & MICHIGAN ELECTRIC COMPANY,
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ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA;
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BRIEF FOR RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA, IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 481 F.2d 490.

QUESTIONS PRESENTED

1. Whether the court of appeals correctly followed this Court's decisions in *United Gas Pipe Line Co.* v. *Mobile Gas*

Service Corp., 350 U.S. 332 (1956), *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958).[1]

2. Whether the court of appeals was required to remand the proceedings to the Federal Power Commission for findings of fact when the sole factual issue before the court was the interpretation of a contract, an issue upon which the Commission had made findings of fact which the court of appeals determined to be in error.

STATEMENT

Respondent Richmond Power and Light of the City of Richmond, Indiana (Richmond) is a municipally-owned electric utility which supplies the City of Richmond, Indiana, its inhabitants, and adjacent communities with electric energy for public, commercial and industrial use. Richmond purchases electric energy for this purpose from petitioner Indiana & Michigan Electric Company (I&M) under a contract, filed with the Federal Power Commission (FPC), which establishes the rate for such service as I&M's "Tariff I.P. as regularly filed with the Public Service Commission of Indiana, . . . as long as said tariff is in effect." The Richmond-I&M contract was entered into on November 15, 1965, after I&M's wholesale for resale sales had been determined by the Federal Power Commission to be subject to FPC jurisdiction and after I&M had commenced filing its wholesale for resale rate schedules with the FPC.[2] The contract runs for a ten year period commencing January 1, 1966.

It was undisputed below that Tariff I.P., as regularly and currently filed with the Public Service Commission of Indiana, is an effective rate of I&M. Large industrial customers of I&M

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[1] These cases are referred to hereafter as *"Mobile"*, *"Sierra"*, and *"Memphis"*, respectively.

[2] In *Indiana & Michigan Electric Co.*, 35 FPC 298 (1966), the Commission noted that I&M commenced filing its wholesale for resale rate schedules with the Commission on July 1, 1965.

are served under Tariff I.P., as well as some wholesale customers which elected that rate, including Richmond.

Despite the continued existence of Tariff I.P., I&M sought to replace Tariff I.P. in its rate schedule for service to Richmond by a unilateral filing with the Federal Power Commission of a new Rate Schedule WS, substantially higher than Tariff I.P.[3]

Richmond protested the unilateral filing of Tariff WS and asked the Federal Power Commission to reject the filing as inconsistent with I&M's contractual undertaking to serve Richmond under Tariff I.P. as long as that Tariff is in existence. The Commission denied Richmond's request, holding that since the contract contemplated some change in rate it did not preclude the filing of Tariff WS to supersede Tariff I.P. for service to Richmond.

The court of appeals reversed the Commission. Applying the rule of *Mobile*, *Sierra* and *Memphis*, the court below held that under the Richmond-I&M contract the only changes that can be filed unilaterally with the FPC by I&M are those changes made in the Tariff I.P. as it is regularly filed with the Public Service Commission of Indiana. It thus directed the Commission to reject I&M's attempted unilateral filing of Rate Schedule WS to replace Tariff I.P. for service to Richmond.

ARGUMENT

The decision below, which is in accord with the decisions of this Court in the *Mobile*, *Sierra* and *Memphis* cases, *supra*, is clearly correct and does not warrant further review by this Court. There is no conflict among circuits alleged or extant.

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[3]The Tariff I.P. rate was increased approximately 10 per cent in March, 1972 by order of the Public Service Commission of Indiana. However, I&M did not at that time make a filing with the FPC to conform Richmond's rates to the new Tariff I.P. rates, as the Richmond-I&M contract clearly permits. The Rate Schedule WS rate filed unilaterally by I&M represents instead a rate increase to Richmond of approximately 45 percent.

I. All that is at issue in this case is a clear and simple matter of contract interpretation. The law as expressed by this Court is clear and straightforward and has been accurately stated by the court below as follows:

> "The rule of *Sierra, Mobile* and *Memphis* is refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid." (footnote omitted). 481 F.2d at 493.

The *Sierra* and *Mobile* cases involved attempts to unilaterally change rates under fixed-rate contracts by making filings with the FPC pursuant to Section 205 of the Federal Power Act (or its equivalent, Section 4 of the Natural Gas Act). The Court held that the filing requirements of the Act do not operate to abrogate private contract rights and a rate change filing inconsistent with the contract is a nullity and must be rejected by the Commission. In *Memphis* the Court held that when a contract expressly provides for unilateral rate changes such changes can lawfully be made by a filing pursuant to Section 4 of the Natural Gas Act (equivalent to Section 205 of the Federal Power Act). The doctrine of these three cases thus operates to preserve the integrity of private contracts. As the court of appeals stated below: "These principles apply whether the parties agree to a specific rate or whether they agree to a rate changeable in a specific manner." 481 F.2d at 497.

The court of appeals examined the contract between Richmond and I&M and determined that under the express language of that contract Richmond is entitled to purchase electric energy from I&M during the term of the contract under the rate in I&M's Tariff I.P. as regularly filed with the Public Service Commission of Indiana, as long as Tariff I.P. remains in effect. It was undisputed below and remains undisputed here that Tariff I.P. is alive and well and operating as the basis upon which service is rendered to a group of I&M's industrial customers in Indiana. The court below thus properly held, applying the *Mobile, Sierra, Memphis* rule, that only changes in Tariff I.P. as filed with the Public Service Commission of

Indiana could be unilaterally filed by I&M with the Federal Power Commission as a change in rates for service to Richmond. The new Rate Schedule WS was not such a change and was properly ordered to be rejected.

2. I&M argues that its contract with Richmond is "nearly identical" in pertinent part to the contract under consideration in the *Memphis* case and that since the *Memphis* contract was held by this Court to permit unilateral rate filings by the supplier, the ruling below conflicts with this Court's holding in the *Memphis* case (Petition, p. 11). As the court below correctly recognized, the Richmond-I&M contract language is not analogous to the language of the *Memphis* contract. The agreements in *Memphis* provided for payment under a designated rate schedule *"or any effective superseding rate schedules* on file with the Federal Power Commission" (Emphasis in original). *Memphis, supra,* at 105. The Richmond-I&M contract provides for payment as follows:

> "The Customer hereby agrees to pay the Company monthly for electric energy delivered hereunder at the rate and under the provisions of Company's Tariff I.P. as regularly filed with the Public Service Commission of Indiana, said tariff being selected by the Customer, as long as *said* tariff is in effect; and in the event *said* tariff is replaced by a new or revised tariff incorporating higher or lower rates than those stipulated in the *aforementioned* tariff, the Company will continue to furnish service as stipulated in the Agreement and the Customer will pay for such service at the higher or lower rates from and after the date when such rates are made effective. Should the new or revised tariff incorporate higher rates, the Customer shall have the option of cancelling the Agreement prior to its expiration date provided notice of cancellation is furnished the Company within 15 days after the first billing date at the higher rates." (Emphasis added).

The Richmond-I&M contract, unlike the agreement in *Memphis,* does not provide for service under "*any* effective

superseding rate schedule" filed with the FPC by the company, but rather under the rates in one specific rate schedule, namely "Tariff I.P. as regularly filed with the Public Service Commission of Indiana", as said Tariff I.P. may be changed from time to time. The ruling of the court below is thus completely consistent with this Court's ruling in *Memphis*.

3. I&M argues that the court below has "confected" a new universally applicable, "parity theory" forbidding filing of wholesale rate increases which would disturb rate parity between wholesale sales and retail industrial sales of electricity. (Petition pp. 12-16). The court of appeals has done nothing of the sort.

The FPC argued to the court of appeals that the reference in the contract to the "Tariff I.P. as regularly filed with the Public Service Commission of Indiana" merely indicated that "at the time the agreements were made, the Public Service Commission of Indiana was regarded as the regulatory body with jurisdiction". 481 F.2d at 495. The court of appeals pointed out that this premise was factually incorrect and that the contract was entered into with full knowledge that the FPC, not the Indiana Commission, had jurisdiction over the service covered by the contract. 481 F.2d at 495-496.

The court of appeals went on to note the obvious reason why Richmond and I&M had agreed that the rate for this service would be governed by the Tariff I.P. as filed with the Public Service Commission of Indiana,[4] namely, that the contract therefore "ensures that Richmond, when it resells power to its industrial retail buyers, will be able to price itself competitively with the retail rates I&M offers to its own industrial customers"[5] 481 F.2d at 496. Thus, what I&M

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[4]As the contract expressly recognizes, the Tariff I.P. was a rate selected by Richmond for this service.

[5]Contrary to the statement on page 17 of the petition, Richmond did make this argument in its pleadings before the Federal Power Commission. (R. 40, 181-182). The reference "R." is to the pages of the Joint Appendix printed for use in the court below.

characterizes as a novel "parity theory" is no more than the answer of Richmond and the court of appeals to an untenable argument put forth by the Commission as to the reason for the reference in the contract to a tariff subject to the jurisdiction of the Public Service Commission of Indiana. It in no way alters the plain language of the contract or the interpretation of the contract which logically flows from that language.

4. I&M argues that the effect of the ruling below is to confer jurisdiction upon a state regulatory agency to determine rates for wholesale sales not subject to its jurisdiction. (Petition p. 13). This argument was made by the FPC in denying rehearing of its order accepting I&M's filing of the new Rate Schedule WS to replace Tariff I.P., and was fully answered by the court of appeals. In discussing this argument the court below said:

> "This response is most troubling, for it shows that the Commission simply does not understand, or more likely is not willing to abide by, the fundamental principle of the *Sierra-Mobile-Memphis* decisions. * * * Thus, in our own case, the Commission always remains free, upon its own motion, to enter into a proceeding under Section 206(a) of the Act to determine whether the contract rate between Richmond and I&M is 'unjust, unreasonable, unduly discriminatory or preferential * * *.' [footnote omitted] If it so determines, it can order the rate changed. If the Federal Power Commission believes that the Public Service Commission of Indiana is being niggardly in approving rate increases in Tariff IP, it is free to enter into a proceeding to require Richmond or any other wholesale buyer to pay a higher rate. In summary, the Richmond-I&M contract, like the contracts in *Mobile* and *Sierra*, does not limit the Commission's jurisdiction, for under the Act the Commission has no jurisdiction to change contract rates except after determining, through a proceeding under Section 206(a), that the contract rate is unreasonable." 481 F.2d at 497-498.

5. I&M contends that this case must be remanded to the Commission for findings of fact. The only "fact" in issue is the

contract itself, which was before the court of appeals. The FPC has no special expertise in contract law or contract interpretation, and the court of appeals was fully competent to examine the contract and determine that the FPC had misconstrued it.

The language of the Richmond-I&M contract is plain and unambiguous. Courts have uniformly held that where the language of a contract is clear and unambiguous the words will be given their plain and literal meaning without resort to any rules of interpretation or outside evidence of intention. *Climaco Calderon* v. *Atlas Steamship Co., Ltd.*, 170 U.S. 272 (1897); *Plymouth Mutual Life Insurance Co.* v. *Illinois Mid-Continent Life Insurance Co.*, 378 F.2d 389 (3rd Cir. 1967); *Standard Title Insurance Co.* v. *United Pacific Insurance Co.*, 364 F.2d 287 (8th Cir. 1966). It would thus be unnecessary and inappropriate to remand this case to the Federal Power Commission to adduce evidence as to the intent of the parties, as I&M suggests. The contract states on its face that:

> "There are no unwritten understandings or agreements relating to the service hereinabove provided."

The language describing the rates to be charged is clear and unambiguous: it establishes the rates as those contained in I&M's "Tariff I.P. as regularly filed with the Public Service Commission of Indiana", and there is an existing tariff meeting that description. No more is necessary.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

October 19, 1973

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SUPREME COURT, U. S.

FILED

OCT 19 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-511

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

v.

ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA; RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT ANDERSON POWER & LIGHT OF THE CITY OF ANDERSON, INDIANA IN OPPOSITION

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IN THE

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OCTOBER TERM, 1973

No. 73-511

INDIANA & MICHIGAN ELECTRIC COMPANY,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT ANDERSON POWER & LIGHT OF THE CITY OF ANDERSON, INDIANA IN OPPOSITION

OPINIONS BELOW

The opinion, judgment and order of the United States Court of Appeals to which the Petition for a Writ of Certiorari is directed are accurately and adequately set forth in the Appendix filed by the Petitioner at pp. 1a and 26a.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the District of Columbia Circuit, reversing the subject orders of the Federal Power Commission, presents any Federal or Constitutional issue relating to the regulatory jurisdiction of the Federal Power Commission necessitating review by this Court?
2. Whether the United States Court of Appeals for the District of Columbia Circuit correctly applied the principles of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956) and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) in reversing the subject orders of the Federal Power Commission?
3. Whether the request by Petitioner for remand to the Commission for further evidentiary hearings is untimely and whether such hearings would serve any useful purpose?

STATUTES INVOLVED

The issues posed in the Petition for a Writ of Certiorari involve Sections 205, 206 and 313 of the Federal Power Act, 16 U.S.C., sections 791 *et seq.*, pertinent portions of which have been set forth by the Petitioner in the Appendix at p. 50(a).

COUNTERSTATEMENT OF THE CASE

Indiana & Michigan Electric Company, the Petitioner herein, was an Intervenor in two different but related appeals initiated by Respondents Anderson Power & Light of the City of Anderson, Indiana, (hereinafter Anderson), and Richmond Power & Light Company of Richmond, Indiana, (hereinafter Richmond), seeking re-

lief from orders of the Federal Power Commission (hereinafter Commission).

Anderson filed a Petition for Review on October 31, 1972, (Appeal No. 72-2035) with the United States Court of Appeals for the District of Columbia Circuit seeking reversal of a portion of an Order of the Commission dated August 11, 1972, entitled "Order Accepting for Filing and Suspending Revised Tariff Sheets, Denying Motions to Reject Filing, Providing for Hearing, Establishing Procedures, Permitting Interventions, Denying Waiver, and Fixing Effective Date", and the further order of the Commission dated October 6, 1972, entitled, "Order Denying Rehearing, Request for Oral Argument, Request for Rejection of Rate Filing, and Motion to Reject Supplementary Pleading." Earlier, Richmond had filed a similar Petition for Review (Appeal No. 72-1963), seeking review of the same orders of the Commission and raising issues substantially identical to those presented in Anderson's Petition.

By Order of the Court dated December 21, 1972, the referenced petitions were consolidated.[1] Anderson's Petition for Review arose out of the following facts and circumstances:

The City of Anderson is a municipal corporation duly organized and existing under and by virtue of the laws of the State of Indiana, and owns and operates a municipal electric utility (Anderson Power & Light of the City of Anderson), serving customers within its territorial limits and environs. Anderson purchases all elec-

[1] Indiana & Michigan Electric Company filed its own Petition for Review (Appeal No. 72-2168), with the Court challenging different portions of the same orders of the Commission. Initially, I & M's Petition for Review was consolidated with those of Anderson and Richmond. However, before argument, I & M's Petition was severed due to the different nature of the issues presented. That petition is still pending before the United States Court of Appeals for the District of Columbia Circuit.

tric power it requires at wholesale from Petitioner, a "public utility" within the meaning of Section 201 of the Federal Power Act, 16 U.S.C. § 824(e). All such wholesale sales to Anderson are now subject to the regulatory jurisdiction of the Commission. The present controversy resolves around the interpretation, construction and application of a contract first entered into between Anderson and Petitioner on April 17, 1957, whereby Petitioner agreed to furnish, and Anderson agreed to purchase, electric power at wholesale to meet Anderson's then existing power needs. The rate to be paid by Anderson to Petitioner for wholesale power was and is fixed in the contract by reference to I & M's Tariff IP, available to certain retail industrial customers in Indiana, ". . . as long as said tariff is in effect. . ." [2]

In 1961, representatives of Anderson and Petitioner agreed to study the contract provisions and their joint operations to the end that Anderson might have all the power required for growth and development "at the lowest possible rate" and to accomplish the following objectives:

a. Allow the City to operate the generating plant so as to use only lowest cost fuel both for electric generating and for steam heating service.

b. Revise the contract so as to give the City increased flexibility in scheduling plan operation so as to enable the City to realize the lowest generating cost and lower over-all cost for power.

c. Give the City a source of maintenance power in the event of an emergency breakdown of City's #4 Unit.

d. I & M be required to furnish additional capacity as needed by the City.

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[2] Respondent's Appendix A, at 1a, attached hereto.

e. Assure the City of a long range supply of power at reasonable rates subject to approval by the Public Service Commission of Indiana.[3]

Following said study, certain contract changes were suggested and agreed to and, by letter dated January 2, 1963, Mr. R. E. Doyle, Jr., Vice President of I & M, explained the changes and set forth the contract amendments. The contract amendments were accepted by the Mayor of Anderson on December 11, 1963, and adopted by Anderson's Common Council per Ordinance No. 47-63 dated December 23, 1963.

The contract amendment of 1963 did nothing to affect the continued efficacy of Petitioner's commitment to provide power and energy to Anderson under Petitioner's Tariff IP. The amendment is, however, relevant, notwithstanding Petitioner's disclaimer to the contrary (Petition at 3, fn. 3) since the Petitioner in the amendment committed itself to continue to supply energy to Anderson "at the lowest possible rate", to "[a]ssure the City of a long range supply of power at reasonable rates," and to assure ". . . that the City have all the power required for growth and development . . ." of industry and economic opportunity in Anderson.[4]

In 1957, when the contract was initially executed, and in 1963, when the contract was amended, the Public Service Commission of Indiana had jurisdiction over the wholesale transactions involved herein, the Federal Power Commission not yet having asserted jurisdiction over these transactions under the Federal Power Act. Subsequently, the Commission did assert such jurisdiction (*Indiana & Michigan Electric Co.*, 33 F.P.C. 739 (1965)), and its authority over Petitioner's wholesale electric rates was sustained over Petitioner's challenge. (*Indiana*

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[3] See Respondent's Appendix B, at 1b, attached hereto.

[4] Respondent's Appendix B, at 16.

& Michigan Electric Company v. *F.P.C.*, 365 F.2d 180 (7th Cir. 1965), *cert. denied*, 385 U.S. 972 (1966).

Once the Commission's jurisdiction was established, the subject contract was filed with the Commission as F.P.C. Rate Schedule No. 27. Thereafter, in 1965, the Commission, pursuant to § 206 of the Federal Power Act, undertook an investigation of rates charged by the Petitioner to its municipally owned wholesale customers. (*Indiana & Michigan Electric Co.*, 35 F.P.C. 298 (1966)). Petitioner and Anderson, among others, were parties to that proceeding which was resolved by settlement among the parties. Neither the Commission's investigation nor the resulting settlement had any effect on the contract between Petitioner and Anderson. In this regard, the Court below noted that:

> An order approving an offer of settlement [following the investigation], to which all parties agreed, was issued some two years later. See *Indiana & Michigan Electric Co.*, 39 F.P.C. 272 (1968). Under the settlement, each municipal wholesale buyer was given the option of switching from its present tariff to a new Tariff MRS, thereby obtaining a rate reduction. Evidently most municipalities availed themselves of this option, since when I & M tendered its Rate Schedule WS for filing in June, 1972, the tender indicates that out of 16 municipal wholesale customers the rates of 12 were governed in June 1972 by Tariff MRS. *Notably, Richmond and Anderson were among those municipal buyers that did not take advantage of the opinion and I & M's June 1972 tender states that their rates were still governed by Tariff IP. Anderson Power & Light of the City of Anderson, Indiana* v. *Federal Power Commission*, 481 F.2d 490, 497, fn. 13 (D.C. Cir. 1973). [Emphasis added].

The final transaction between Anderson and Petitioner relevant to the dispute herein occurred in 1969. In that

year, four years after the Commission asserted jurisdiction over Petitioner's wholesale transactions, including the contract at issue herein, Petitioner submitted a proposed new contract to Anderson which provided that electricity would be sold "at the rate and under the provisions of Company's Tariff IP as regularly filed with the Public Service Commission of Indiana . . . so long as said Tariff is in effect." [5] At all times relevant hereto, Tariff IP has been and is in effect in the State of Indiana for sales by Petitioner to its industrial customers. For reasons not relevant here, Anderson declined to accept the proposed amended contract and service was continued under the terms and conditions of the original contract, as amended in 1963, on file with the Commission as FPC Tariff No. 27.

Notwithstanding the subject contract, the amendment thereto and Anderson's refusal to accept any other tariff offered by Petitioner, and notwithstanding the Petitioner's reaffirmation of the contract in 1969, Petitioner, on June 13, 1973, filed with the Commission, pursuant to Section 205 of the Federal Power Act, proposed changes in rates and charges for Anderson, Richmond and other municipal customers. The proposed charges would have supplanted the existing Tariff IP, as to Anderson and Richmond, with Tariff WS, a wholly new tariff, which would have increased wholesale power costs to Anderson by 38%. After notice by the Commission of the changes issued June 23, 1972, Anderson filed a formal protest and petition to intervene on July 3, 1972, and a supplement to its petition to intervene on August 2, 1972. The proposed tariff changes were accepted for filing by the Commission on August 11, 1972, but the effective date thereof was suspended for five months until January 13, 1973. In the same order, the Commission denied Anderson's motion to reject the proposed tariff changes on the

[5] 481 F.2d at 498-99.

basis of the contract between Anderson and the Petitioner. On October 6, 1972, the Commission denied Anderson's Application for Rehearing, whereupon Anderson petitioned the Court of Appeals to review the matter.

As explained more fully hereinafter, the Court of Appeals, on May 25, 1973, reversed the orders of the Commission and remanded the case to the Commission with instructions to reject the proposed tariff changes as to Anderson and Richmond and to implement procedures for the refund of incremental charges unlawfully collected by Petitioner after January 13, 1973. *Anderson Power & Light of the City of Anderson, Indiana* v. *Federal Power Commission*, 481 F.2d 490 (D.C. Cir. 1973).

A Petition for Rehearing filed by the Petitioner was denied and, on September 19, 1973, the Petitioner filed the current Petition for a Writ of Certiorari with this Court.

As hereinbefore noted, Petitioner was an intervenor in the proceedings below, while the Commission was the Respondent. It is relevant to point out that the Commission neither sought rehearing of the decision below, nor petitioned this Court for a Writ of Certiorari.

THE JUDGMENT OF THE COURT OF APPEALS

The Petitioner's description of the decision and judgment below is misleading. After correctly identifying the date the decision issued, the Court from which it issued, the author of the opinion, and correctly citing controlling decisions of this Court, I & M attempts to torture the language of the decision below in a way that leads the reader inexorably to the conclusion that the decision of this Court in *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), is dispositive of the issues herein. In its attempt to bring this case within the principles of the *Memphis*

Decision, the Petitioner makes the following incorrect and misleading assertions respecting the decision of the Court below:

1. That the Court below construed "rate tariff[s] of general applicability . . . to bar rate changes." (Petition at p. 7).
2. That the Court below decided that Petitioner "was barred from filing any rate increase except one." *Ibid.* at p. 7.
3. That the Court below empowered the Public Service Commission of Indiana ". . . to establish a ceiling on the rates which I & M could charge to Anderson and Richmond, despite the fact that I & M's service agreements with them are subject only to Federal jurisdiction". *Ibid.* at p. 7.
4. That the Court below "confected" a "competitive squeeze theory" to reach a construction of contract terms otherwise not justifiable. *Ibid.* at pp. 8 and 12.

Contrary to Petitioner's assertions, the Court below merely applied a "refreshingly simple" rule long established and recognized in previous decisions of this Court.

In the words of the Court below:

> The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid. 481 F.2d at 493.

In reversing the decision of the Commission, the Court below simply applied traditional rules of contract construction and concluded that the subject contracts prohibited unilateral action on the part of Petitioner in filing proposed tariff changes with the Commission during the term of the existing contract.

As to the tortured interpretation of the decision below by Petitioner, it is relevant to note that Tariff I.P. speci-

fied in the Anderson contract is not a tariff of "general applicability", since Petitioner serves only seven Indiana retail customers and three of sixteen Indiana wholesale customers thereunder.[6] As to each of these ten customers, the terms and conditions of the contracts are identical, or nearly so, and are wholly and distinctly different from the numerous tariffs applicable to the myriad other power customers of Petitioner in Indiana.

Contrary to Petitioner's assertion, the Court below did not decide that Petitioner "was barred from filing any rate increase except one", nor did the decision below have the effect of empowering the Public Service Commission of Indiana ". . . to establish a ceiling on the rates which I & M could charge "to Anderson". In point of fact, the Court below decided that Petitioner could file any proposed tariff changes it desires with the PSCI under Tariff IP and implement any changes approved there through a subsequent filing with the Commission subject to its jurisdiction over Petitioner's wholesale sales.[7] The Court also held that the Commission is free, at any time, to conduct an investigation and make findings of its own pursuant to its superior regulatory jurisdiction under Section 206(a) of the Federal Power Act.[8] And, as noted above, this is precisely the procedure followed by the Commission in the 1965 proceedings applicable to all parties hereto.[9]

SUMMARY OF THE ARGUMENT

Anderson, an all-requirements wholesale electric customer of Petitioner, entered into a contract for whole-

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[6] Petition at p. 7, fn. 6. Auburn, Indiana is the third municipal system served under Tariff I.P.

[7] See 481 F.2d at 500-01.

[8] *Id.*

[9] *Id.*

sale electric service with I & M in 1957. While the contract has been amended, as hereinbefore described, the contract has been automatically renewed and remained in full force and effect at all times relevant to these proceedings and cannot be terminated by either party until April 17, 1975, upon two (2) years notice properly given under the express terms and conditions of the contract.

Said contract specifically provides that Anderson shall receive electric service under Petitioner's "Tariff IP" [10] which tariff also applies to sales made at retail to Petitioner's own retail industrial customers.

Sales to Anderson under Tariff IP are subject to regulation by the Federal Power Commission pursuant to the Federal Power Act. Sales to Petitioner's own industrial retail customers pursuant to Tariff IP are subject to the regulatory jurisdiction of the Public Service Commission of Indiana (sometimes referred to hereinafter as PSCI).

The subject contract specifically provides that Petitioner is to provide electric service to Anderson ". . . at the rate and under the provisions of the regularly filed and published tariff selected by the Customer (Anderson) and known as Tariff IP . . ., as long as said tariff is in effect . . ." Petitioner's Tariff IP is still in effect, and Anderson and all of Petitioner's industrial power customers were served thereunder until Petitioner sought, unilaterally, to change the tariff applicable to Anderson. Anderson has never agreed to take service under any other tariff, nor has Anderson agreed to allow Petitioner to substitute tariff provisions or otherwise alter, modify, abrogate or amend the contract unilaterally.

Notwithstanding the aforementioned contract, Petitioner, on June 13, 1972, filed proposed changes in rates and charges seeking Commission approval. Said proposed

[10] Respondent's Appendix A, at page 1.

changes in tariff provisions would have removed Anderson from Tariff IP and placed Anderson under a wholly new tariff (Tariff WS), changing the terms and conditions of the contract.

This attempted filing, Anderson asserts, clearly violates the principles enunciated and established by the Supreme Court of the United States in *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). The decision of the Court below reversing the Orders of the Commission accepting the proposed tariff changes was, therefore, correct. Anderson further asserts that no issue is presented here relating to the Commission's jurisdiction since the operative effect of the decision below allows Petitioner to continue to seek rate increases pursuant to Sections 205(c)(d) and (e) of the Federal Power Act and the Commission to initiate on its own investigation of Tariff IP pursuant to Section 206(a) of the same Act.

Anderson further submits that the decision below was supported by substantial evidence in the form of all relevant contractual documents and amendments thereto, correspondence relevant to the same contractual documents, a unilateral offer by Petitioner to amend the subject contract in 1969 (similar in form to the original contract and thus reaffirming the parties' intent), and proceedings before the Federal Power Commission in 1965 and 1968 which were susceptible of judicial notice by the Court below.

In the light of this substantial evidence, Anderson submits that no useful purpose would be served by remand to the Commission for further "fact finding" as requested by Petitioner.

Finally, Anderson urges that Petitioner's belated request for remand before the Court below during oral

argument, a reversal of its position before the Commission and "on brief" before the Court of Appeals, renders the present request for remand untimely and defective within the meaning of Section 313(b) of the Federal Power Act.

ARGUMENT I

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT REVERSING THE SUBJECT ORDERS OF THE FEDERAL POWER COMMISSION, PRESENTS NO FEDERAL OR CONSTITUTIONAL ISSUES RELATING TO THE REGULATORY JURISDICTION OF THE FEDERAL POWER COMMISSION AND NEED NOT BE REVIEWED BY THIS COURT.

The Petitioner, in its distorted and convoluted statement of the facts and issues, attempts to confuse and obfuscate the central issue in these proceedings and breathe an appearance of importance into an otherwise simple and mundane matter of contract construction under the principles established by this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Anderson submits that the characterization of this dispute by the Court below is correct, *i.e.*, that the dispute herein is "refreshingly simple", and "the contract between the parties governs the legality of the filing." [11]

The Petitioner herein attempts to elevate this contract dispute to the level of a major controversy concerning the parameters of the Commission's regulatory jurisdiction. Anderson submits that the importance of the issues herein should be assessed in light of the Commission's absence in the present proceedings since the Commission

[11] 481 F.2d at 493.

has a far greater understanding of its own regulatory duties, powers and needs than does the Petitioner. Anderson submits that the Court below, in reversing the Orders of the Commission, did nothing more than follow the prior decisions of this Court in delineating the Commission's powers and duties in dealing with wholesale electric power contracts under the Federal Power Act.

In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), this Court, for the first time, set aside orders of the Commission permitting increases in rates for energy supply above those prescribed in contracts between the supplier and its wholesale customer. In *Mobile*, the Court construed Sections 4(c), (d) and (e) and Section 5(a) of the Natural Gas Act,[12] which gives the Commission regulatory jurisdiction over wholesale rates of natural gas companies. The contract in question contained wholesale rate provisions for natural gas to be sold by the supplier to a distributing company. Subsequently, the supplier, without the consent of the distributor, filed new rate schedules with the Commission.

This Court disapproved the Commission's acceptance of the new rates for filing, and the Commission's allowing the new rates to take affect, and held that the filings were a substantive nullity. This Court went on to point out, however, that the Commission did have the power to change contractual provisions pertaining to rates, but only after a specific finding that the contractual rate was "unjust, unreasonable, unduly discriminatory or preferential" under § 5(a) of the Natural Gas Act.[13]

In *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), a decision handed down the

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[12] 15 U.S.C., §§ 717 (c) & (d).

[13] *Id.*

same day as *Mobile*, this Court considered the jurisdiction of the Commission under Sections 205(c)(d) and (e) and Section 206(a)[14] of the Federal Power Act, which are substantially similar to the corresponding sections of the Natural Gas Act. In *Sierra*, the subject bulk power supply contract between a producer and a distributor specified a low wholesale rate designed to forestall or discourage competition from another source. Later, and while the contract remained effective, the producer filed a new rate schedule with the Commission seeking to increase its rates to the distributor by some 28%. The Commission approved the new rate after finding, upon investigation, that it was not unjust, unreasonable, unduly discriminatory or preferential under Sections 205(c)(d) and (e) of the Federal Power Act.

Notwithstanding the fact that the Commission's findings were equivalent to those provided for and authorized under Section 206 of the Act, the Court nevertheless set aside the Commission's order following the precedent of *Mobile* and concluded further that, as a matter of law, it is not sufficient justification, even under section 206(a), for the Commission to permit an upward rate adjustment merely because the contract between the parties is not profitable to the public utility.

In *Sierra*, the following criteria were set down for a proper determination under Section 206(a) of the Act:

> In short, the Commission holds that the contract rate is unreasonable solely because it yields less that [sic] a fair return on invested capital. But, while it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return in that, if it does so, it is entitled to be relieved of its im-

[14] 16 U.S.C., §§ 824 (d) & (e).

> provident bargain . . . In such circumstances, the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. 350 U.S. at 354-355. (Citations omitted). (Emphasis original).

During the pendency of the proceedings herein, neither the Petitioner nor the Commission have asserted that the rate fixed by Tariff IP is "so low as to adversely affect the public interest."

There has been a plethora of litigation involving the principles enunciated in *Mobile* and *Sierra*.[15] In these cases, neither this Court nor lower Federal courts have made any significant retreat from the doctrine there established. These impressive precedents notwithstanding, the Petitioner continues to ignore the doctrine and suggests no adequate rationale for avoiding the application of these principles herein.

In the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), this Court upheld the authority of the Com-

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[15] See, *e.g.*, *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F.2d 470 (10th Cir. 1955), *cert. denied, sub nom., Michigan Wisconsin Pipeline Co.* v. *Phillips Petroleum Co.*, 350 U.S. 1005; *Tyler Gas Service Co.* v. *Federal Power Commission*, 247 F.2d 590 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 895 (1957); *South Carolina Generating Co.* v. *Federal Power Commission*, 249 F.2d 755 (4th Cir. 1957); *Natural Gas Pipe Line Co.* v. *Federal Power Commission*, 253 F.2d 3 (3d Cir. 1958); *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F.2d 860 (10th Cir., 1958); *Phillips Petroleum Co.* v. *Federal Power Commission*, 299 F.2d 370 (7th Cir. 1962); *Superior Oil Co.* v. *Federal Power Commission*, 322 F.2d 601 (9th Cir., 1963); *Shell Oil Co.* v. *Federal Power Commission*, 334 F.2d 1002 (3rd Cir. 1964); *Pan-American Petroleum Corp.* v. *Federal Power Commission*, 352 F.2d 241 (10th Cir., 1965); and *Jupiter Corporation* v. *Federal Power Commission*, 424 F.2d 783 (D.C. Cir. 1969).

mission to impose both maximum and minimum area pricing standards for the sale of natural gas, thus abrogating, in part, existing price standards fixed by existing contracts. However, this Court specifically found that the Commission had made a proper finding under Section 5(a) of the Natural Gas Act, as required by *Mobile* and *Sierra*, justifying the modification of existing contracts. At the same time, the vitality of the *Mobile-Sierra* doctrine was reaffirmed:

> [T]he Commission may not abrogate existing contractual arrangements unless the contract price is so 'low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory . . .' It follows that the Commission was here without authority to abrogate existing contract prices unless it first concluded that they 'adversely affect the public interest' . . . The Commission found that field prices . . . had such consequences . . . 390 U.S. at 820-21. (Citations omitted).

While this Court has recognized certain exceptions to *Mobile-Sierra*, these cases invariably fall in one of four distinct categories, none of which is applicable here, *e.g.*:

(1) Cases in which the Commission has made a *proper* finding under Section 5(a) of the Natural Gas Act that existing contract rates are not in the public interest within the criteria set forth in *Sierra*; (2) cases in which the Commission has additional statutory authorization to order changes in terms and conditions other than rates in utility service contracts;[16] (3) cases

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[16] See, *e.g.*, *Federal Power Commission* v. *Louisiana Power & Light Co.*, —— U.S. ——, 32 L.Ed.2d 369 (1972), where this Court rejected arguments that the Commission lacked jurisdiction to order natural gas companies facing gas shortages to develop and submit curtailment plans for delivery arrangements for all

in which the subject contract itself empowers the utility to make application for rate increases under Sections 205(c)(d) and (e) of the Federal Power Act or Sections 4(c)(d) and (e) of the Natural Gas Act,[17] and (4) in which cases the Commission's order in no way impinges on existing contractual rights.[18]

Anderson submits that the present cause falls in none of the four categories above described. Rather, Anderson's contract with the Petitioner is identical in its operative effect, if not by its precise terms, to the contracts considered in both *Mobile* and *Sierra*.

Petitioner's confusion concerning the regulatory jurisdiction of the Commission herein perhaps stems from the

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gas customers, notwithstanding the presence of inconsistent delivery provisions in existing contracts. The Court cited the Commission's "transportation jurisdiction" and "broad mandate" under section 16 of the Natural Gas Act in reaching the decision. See, also, *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *Federal Power Commission* v. *Amerada Petroleum Corporation*, 379 U.S. 689 (1965); and *J. M. Huber Corporation* v. *Federal Power Commission*, 236 F.2d 550 (3rd Cir. 1956), *cert. denied*, 352 U.S. 971 (1957), all of which are cited by Petitioner, but none of which are applicable here since the decisions there dealt with private attempts to define, by contract, the meaning of "interstate" sales in obvious attempts to divest the Commission of its Congressionally defined jurisdiction.

[17] See, *e.g.*, *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958). See further discussion of *Memphis*, *infra*, p. 23.

[18] See, *e.g.*, *Sun-Ray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 167 (1970), where petitioner attacked a decision of the Commission to issue a certificate of public convenience, unlimited in time, where petitioner's executed service contract was for a term of 20 years. Petitioner contended that the certificate, as issued, was tantamount to an extension of the contract in violation of *Mobile* and *Sierra*. The Court disagreed, pointing out that, during the life of the contract, its operative effect would be unimpaired. The Court acknowledged that the Commission's action made it incumbent upon petitioner to make a showing after the 20-year contract period that the service should be allowed to abate. The Court pointed out, ". . . we do not see how this in any way disturbs the contract during its term."

fact that Petitioner, by contract, chose to fix the tariff rate applicable to Anderson to the Tariff I.P. rate *now applicable* to and *in effect* for certain industrial retail customers of Petitioner in Indiana on file with the Public Service Commission of Indiana. The Petitioner reasons that the regulatory jurisdiction of the Commission is impaired or diminished if the Court recognizes and gives effect to the literal terms and conditions of the contract. But this is the same argument and the same reasoning employed by the Commission itself in the *Mobile-Sierra* controversies, where the Commission argued that the Natural Gas Act and the Federal Power Act vested the Commission with jurisdictional powers which transcend the contractual commitments and obligations of those subject to its *jurisdiction*.

This Court rejected the argument, first in *Mobile*, as quoted below, and subsequently by implication in *Sierra*. In *Mobile*, the Court treated the argument as follows:

> [T]here is] . . . no support to [the Commission's . . . characterization of § 4(d) and (e) as establishing a rate-changing "procedure"—a 'proceeding' before the Commission 'initiated' by a natural gas company filing a 'proposed' change. Section 4(d) provides not for the filing of 'proposals' but for notice to the Commission of any 'change . . . made by a natural gas company, and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action. . . . In short, the Act provides no 'procedure' either for making or changing rates, it provides only for *notice* to the Commission of the rates established by natural gas companies and for review by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act. 350 U.S. at 343. (Emphasis original.)

And further:

> [D]enying to [public utilities] . . . the power unilaterally to change their contracts *in no way impairs the regulatory powers of the Commission*, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. *The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other.* 350 U.S. at 344. (Emphasis supplied.)

Notwithstanding the clear impact and applicability of *Mobile-Sierra* in the present case, Petitioner seeks to confuse the issue and create doubt by reference to the duality of jurisdiction between PSCI and the Federal Power Commission under Petitioner's current contracts. However, the PSCI's involvement is inevitable under these contracts since Petitioner, *by its own choice*, made Tariff IP available both to jurisdictional wholesale customers and non-jurisdictional retail customers and is bound by this commitment throughout the term of its contract with Anderson.

But, as recognized by the Court below,[19] the initial involvement of PSCI in passing on changes in Tariff IP in no way divests the Commission of its jurisdiction. Any change in Tariff IP, as it may apply to wholesale customers, is subject to review by the Commission in proceedings under Section 205(d) and (e) of the Act.[20] In the alternative, if the contract rate is unreasonably

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[19] 481 F.2d at 497.

[20] In point of fact, the Petitioner, on August 30, 1973, filed proposed tariff changes applicable to Anderson and Richmond which are identical to those approved by the Public Service Commission of Indiana on March 29, 1972, for application to Petitioner's retail sales under Tariff IP. These proposed changes, including an upward adjustment in rates by some 10.2%, were approved by the Commission on September 28, 1973, and became effective on September 30, 1973.

low, the Commission has authority to initiate, on its own motion, a proceeding under Section 206(a) in accordance with the standards set forth in *Sierra*.

As the Court below indicated, the latter procedure was utilized by the Commission in 1965 through 1968, where an investigation was undertaken to review rates, charges and terms and conditions of service under which Petitioner sold electric power at wholesale for resale to all municipal customers.[21] This is the precise procedure which the Supreme Court suggested in *Sierra* for situations in which rates are fixed by contract during the contract term. The result of the investigation was two pronged:

(1) The Commission expressly found that providing wholesale service under Tariff IP did not "adversely affect the public interest";

(2) The parties reached a contractually binding settlement agreement which was approved by the Commission under Section 206(a) pursuant to *Sierra*. Under the settlement agreement Anderson continued to take service under Tariff IP. In short, Anderson's contractual rights were reaffirmed by the Petitioner and the Commission. The question of a duality of jurisdiction between the Commission and PSCI was apparently neither raised nor considered. (See 481 F.2d at 497, fn. 13.)

Thus, the decision below presents none of the "invidious" evils perceived and forecast by the Petitioner. As demonstrated, neither the jurisdictional powers nor regulatory potency of the Commission are in jeopardy here. The Commission itself, by virtue of the fact that it fails to join Petitioner in attacking the decision below, appears satisfied that there is no substantial encroachment upon

[21] 481 F.2d at 492, fn. 13.

its powers and prerogatives under the Federal Power Act. Stripped of its spurious trappings, the Petitioner's argument reflects dissatisfaction with what has apparently become an unattractive business commitment voluntarily entered into by the Petitioner in 1957 and reaffirmed several times since that date.

As this Court explicitly recognized in *Mobile-Sierra*, the parties to bulk power supply contracts are free to fix rates and terms and conditions of service by contract in any way they see fit, subject always to the regulatory jurisdiction and approval of the Commission under Sections 205(d) and (e) and Section 206(a) of the Federal Power Act. The parties herein have done nothing more nor less than submit to a mutually binding agreement, and Anderson submits that, since no significant question of regulatory law is presented, no compelling reason exists for this Court to involve itself in what is purely and simply a contract dispute.

ARGUMENT II

THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT CORRECTLY APPLIED THE PRINCIPLES OF *UNITED GAS PIPE LINE CO.* v. *MOBILE GAS SERVICE CORPORATION*, 350 U.S. 332 (1956) AND *FEDERAL POWER COMMISSION* v. *SIERRA PACIFIC POWER CO.*, 350 U.S. 348 (1956) IN REVERSING THE SUBJECT ORDERS OF THE FEDERAL POWER COMMISSION.

As a secondary legal position, Petitioner asserts that, if the principles enunciated in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation*, *supra*, and *Federal Power Commission* v. *Sierra Pacific Power Company*, *supra*, are applicable at all, the Court below erroneously applied these principles to the contracts in question.

In this regard, Petitioner contends that the *Mobile-Sierra* doctrine should be limited in application to those contracts containing tariff provisions defined in dollars and cents figures.[22] This specious contention is arrived at by an extremely restrictive reading of *Mobile* and *Sierra*, and an extremely expansive reading of *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division* 358 U.S. 103 (1958), the third and latest of the trilogy of cases relating directly to the issues herein.

In essence, Petitioner argues that *Mobile* and *Sierra* should be confined to their respective facts and applied only in identical cases in which the rates for the commodity in question are "fixed" and definable in terms of dollars and cents. At the same time, Petitioner essentially urges that the principles of *Memphis* should *always* be applied where bulk power supply contracts make provision for *any* future escalation of rates or changes in the terms and conditions of service regardless of the circumstances.

Anderson submits that this argument, if accepted, would essentially nullify *Mobile-Sierra*, do violence to the plain wording of the Anderson—I & M contract, ignore the elementary precepts of the law applicable to the interpretation of contracts and would be wholly without foundation under any conceivable interpretation of the Federal Power Act or the case law thereunder.

It is a well established principle that a contract is enforceable where the terms thereof are sufficiently definite to ascertain the full meaning of the contract with reasonable certainty.[23] Petitioner does not argue that the Anderson—I & M contract is unenforceable due to vagueness. Indeed, any such argument would be untenable in

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[22] Petition at pp. 9-13.

[23] Am. Jur. 2d, Contracts, § 76, page 415.

light of the contract language which plainly binds the parties to the terms and conditions (including rates) applicable under Tariff IP ". . . as long as said tariff is in effect." The express language of the contract speaks for itself.

The Petitioner, obviously recognizing the effect of the contract language, seeks to extricate itself from the obligations occasioned thereby through the vehicle of urging the adoption of new standards of contractual interpretation for contracts between regulated utilities and their wholesale customers.

In this regard, Petitioner points to the language in the subject contract which does refer to the replacement of Tariff IP by a "new" or "revised" tariff by Petitioner and, on this basis, concludes that *Memphis* is applicable.

Petitioner's contention, however, conveniently overlooks the commitment made by Petitioner to serve Anderson under Tariff IP "as long as said Tariff is in effect," irrespective of what might occur in future proceedings under the Federal Power Act. There is no dispute that the tariff is still in effect, and that it has not been supplanted by a "new" or "revised" tariff.

Moreover, Petitioner refuses to acknowledge the factual difference between *Memphis* and the case at bar. In this regard, the rate contract at issue in *Memphis* provided, in part, that:

> All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule . . . *or any effective superseding rate schedules, on file with the Federal Power Commission.* This agreement in all respects shall be subject to the applicable provisions of such *rate schedule . . . filed with the Federal Power Commission. . . .*[24] (Emphasis supplied.)

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[24] 358 U.S. at 109.

Thus, the contract in *Memphis* went far beyond authorizing a future rate increase triggered by some future event. It specifically authorized the filing of superseding rate schedules with the Federal Power Commission, the precise event that triggers a proceeding under Section 4(d) and (e) of the Natural Gas Act or under Section 205(c) and (d) of the Federal Power Act, depending on the nature of the regulated utility.

The contract between Anderson and the Petitioner, on the other hand, is clearly distinguishable. There is no reference therein to the role to be played by the Federal Power Commission or the filing of rate schedules or amendments therewith. The regulated utility in *Memphis* did not bargain away its ability to seek rate increases under "new" or amended tariffs. By way of contrast, Petitioner has contracted away this option during the term of the contract by agreeing to serve Anderson under Tariff IP "so long as said tariff is in effect."

The theory here espoused by the Petitioner wholly ignores three relevant and compelling decisions decided after *Mobile-Sierra*. In *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 281 F.2d 919 (D.C. Cir. 1960), the Court enforced a contractual settlement agreement which resulted from an ancillary judicial proceeding. The prevailing rate standards were based on the terms of the settlement agreement in the proceeding. Thus, the *Mississippi River* decision establishes the applicability of *Mobile-Sierra* to contracts where rates are "fixed" by reference to extra-contractual events and standards. The rates there were not "fixed" in terms of dollars and cents.

In both *Texas Gas Corporation* v. *Federal Power Commission*, 250 F.2d 27 (D.C. Cir. 1957), and *Shell Oil Company* v. *Federal Power Commission*, 334 F.2d

1002 (3rd Cir. 1964), the Court was called upon to interpret contracts in which the commodity rate was subject to increase should certain future contingencies occur. The applicability of the *Sierra-Mobile* doctrine was never in issue in these cases inasmuch as it was assumed, and properly so, that the contracting parties had the unrestricted right to condition their respective contractual rights upon events which may occur in the future. The viability of basing such changes on conditions subsequent in power purchase contracts was thus sustained under established principles of the law of contracts. These decisions, while recognizing the freedom of the parties to contract, also recognize the jurisdiction of the Federal Power Commission to approve or disapprove any change in terms and conditions of service, including rates, under contract which accommodate such changes during the term of the contract. Anderson has recognized this authority of the Commission throughout these proceedings in conceding that the contract between Anderson and the Petitioner would accommodate such changes as may be consistent with changes made in Tariff IP.

Again, Petitioner chose to permit Anderson to take its wholesale power under Tariff IP during the term of the contract. This right was subject to only one condition; *i.e.*, the existence of Tariff IP during the contract term. Since Petitioner continues to provide service to its own retail customers under Tariff IP, it is obligated under its contract to extend the same conditions of service and the same rates for power to Anderson until expiration of the contract. The attempted unilateral change in the contract executed in 1957, amended in 1963 and reaffirmed by negotiated settlement in 1967, was therefore unlawful.

These facts and circumstances notwithstanding, Petitioner persists in the argument that the decision below

was based upon "insufficient evidence" [25] and that (1) the Court below "confected" a "parity" theory in justifying the construction placed on the contract; [26] and (2) the Court below erroneously looked to Indiana law as an additional aid in interpreting the intent of the parties in entering into the subject contract.[27] Both of these specifications of error must fail.

In this regard, the lower Court's discussion of rate "parity" recognized Anderson's contention that it was entitled to protection against discriminatory rate structures so as to ensure Anderson a competitive posture in attracting new industry and commercial enterprises to the City. The Court neither established, nor sought to establish any new principle or to venture beyond the record. The discussion merely sets forth obvious economic factors present in the operation of all utility systems.

Yet, Petitioner asserts that the Court's observation is "without any factual support." [28] This contention, of course, presupposes that factual support is needed for the Court below to take cognizance of simple economic reality. Petitioner also asserts that ". . . a customer always has 'an interest' in avoiding a rate increase." [29] At the same time, and as the Court below discussed, a party to a long-term bulk power supply contract also has a legitimate interest in preserving the viability of its contract.

The lower Court's discussion of rate "parity" as a factor to be considered in construing the intent of the

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[25] See Argument III, *infra*.

[26] Petition at p. 12.

[27] Petition at p. 22.

[28] Petition at p. 12.

[29] Petition at p. 13.

parties is nothing more than a recognition of the fact that Anderson had a legitimate economic interest in entering into a long range power supply contract. The Court below quite correctly recognized Anderson's need to keep its electric rates as low as possible in order to insure the long term health of its electric system and the municipal area served thereby. If Anderson was not able to offer rates reasonably competitive with industrial rates offered by Petitioner and other power suppliers, new industry would lack incentive to locate in Anderson. This type of economic interest has been recognized as valid in the recent decision of this Court in *Otter Tail Power Company* v. *United States*, —— U.S. ——, 35 L.Ed. 359 (1973).

More importantly, the Petitioner is wholly incorrect in asserting that there is no "factual support" [30] for the lower Court's observation that Anderson has a legitimate economic interest in securing competitive rates. As noted in the foregoing Counterstatement of the Case, Anderson and Petitioner amended the subject contract in 1963, and, as part of the amendment, Petitioner committed itself to continue to supply energy to Anderson "at the lowest possible rate"; to "[a]ssure the City of a long range supply of power at reasonable rates"; all to assure ". . . that the City have all the power required for growth and development . . ." [31] Anderson submits that the statement of its economic interests in maintaining the viability of the present contract is clear and that the Court quite properly took this into account in determining the intent of the parties to be bound thereby. Thus, the Petitioner's assertion that the Court below had no facts upon which to measure Ander-

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[30] Petition at p. 12.

[31] See p. 4, *supra*. And see Respondent's Appendix B attached hereto.

son's economic interest in the contract is without foundation.

In any event, it cannot be stated, as Petitioner urges, that the Court below decided the case on the basis of any "new theory". At all stages of the proceedings below, both the Commission and the Court had before them the current contract, including the 1968 amendments. The Court below, under these circumstances, properly concluded that where, as here, the language of a contract is clear and unambiguous, the words will be given the efficacy demanded by their plain meaning and resort to evidence beyond the contract terms is unnecessary.[32]

Petitioner's second assignment of "evidentiary error" is likewise without merit. Specifically, Petitioner objects to the Court's reference to Indiana law in determining the intent of the parties. While probably unnecessary, the reference to Indiana law was entirely proper when considered in light of the fact that the Public Service Commission of Indiana had jurisdiction over transactions between Anderson and the Petitioner at the time of the execution of the contract.[33]

The lower Court's analysis of Indiana law was also necessitated by the fact that the Commission, in refusing to uphold the contract, had reasoned that, since the contract was executed when PSCI had jurisdiction, the subsequent assertion of jurisdiction by the Commission abrogated and nullified the contract.[34]

This contention was properly rejected by the Court below on both legal and factual grounds. The Court

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[32] *Climaco Calderon* v. *Atlas Steamship Co., Ltd.*, 170 U.S. 272 (1897); *Plymouth Mutual Life Insurance Co.* v. *Illinois Mid-Continent Life Insurance Co.*, 378 F.2d 389 (3d Cir. 1967).

[33] See 481 F.2d at 494-95.

[34] *Id.*

first observed that the Commission's conclusion on this issue:

> . . . [I]s beside the point. The issue under Memphis is not whether the parties contemplated change by the appropriate regulatory authority, for under the law every electric power contract must contemplate such change. Instead, the question is whether the parties contemplated that the seller could unilaterally effect a change in the rate simply by filing a new tariff with the appropriate regulatory agency. (481 F.2d 499.)

The observation by the Court is unassailable.[35] Moreover, this analysis would appear consistent with the Commission's own policy statement respecting the Federal-State dichotomy in utility regulation:

> . . . With the State-Federal regulatory dichotomy, equity and fairness demand that classes of customers subject to one jurisdiction be neither preferred nor penalized in relation to those subject to the other jurisdiction. *Duke Power Company*, FPC Opinion No. 64, (December 18, 1972), at p. 5.

Unfortunately, this policy was apparently not yet formulated when the Commission decided the *Anderson* case. Anderson was clearly "penalized" while Petitioner's retail industrial customers were "preferred" as a result of the regulatory dichotomy.

The Court below corrected this inequity, and Anderson submits that it was necessary, in reviewing the Commission's orders, for the Court below to examine the applicable procedures under Indiana laws for modifying utility tariffs. This was so since Anderson had executed its contract prior to the time the Commission asserted its jurisdiction in the premises and, on that

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[35] See *United Gas Pipe Line* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 110 (1958).

basis, the Commission concluded that the reference to the PSCI in the contract therefore had no effect once federal jurisdiction was established. But, as the Court pointed out,[36] Indiana law contemplates tariff changes in proceedings comparable to those under Section 206 of the Federal Power Act,[37] and, therefore, the Commission's conclusion that the reference to PSCI is irrelevant was thereby shown to be incorrect.[38]

The Petitioner also complains that ". . . there was no evidence and no agency fact-finding as to the rate changing procedures that the parties 'contemplated' ".[39] With all due respect for counsel for Petitioner, this assertion is simply false. The procedures for tariff changes were well known to the parties when the contract was initiated. Of necessity, those procedures, with respect to wholesale tariffs, were modified when the Commission asserted jurisdiction over wholesale transactions in 1965. Yet, as Petitioner is well aware, as late as 1969, well after the duality of Commission—PSCI jurisdiction was established, the Petitioner tendered to Anderson a new contract which provided expressly that electricity would be furnished ". . . at the rate and under the provisions of Company's Tariff IP as regularly filed with the Public Service Commision of Indiana"[40]. As noted by the Court below:

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[36] 481 F.2d at 500.

[37] *Id.*

[38] Note: Petitioner's assertion that the Court below misread Indiana law is incorrect (see Petition at p. 22). The fact that the PSCI has the power to change rates in an "emergency" *is* irrelevant here. For, under *Mobile* and *Sierra* and Section 205 of the Federal Power Act, it is the *regulated utility*, and *not* the Commission, that has the power to effectuate tariff changes. The cited authority of the PSCI to order rate changes is analogous to the emergency powers of the Commission under Section 202 of the Federal Power Act.

[39] Petition at p. 22.

[40] See Respondent's Appendix C attached hereto.

> The obvious truth of the matter is that Anderson, like Richmond, intended to key its rates to those charged by I & M to its own industrial customers in order to protect itself against the same competitive squeeze that concerned Richmond. *Any uncertainties one might have as to what the contracting parties intended are set to rest by the fact that in 1969, some four years after it had become clear the Federal Power Commission was the appropriate regulatory body, I & M tendered to Anderson for its approval a contract . . . identical with the Richmond—I & M contract . . . 481 F.2d* at *501.* (Emphasis added).

While Anderson, for reasons not relevant here, did not execute the contract tendered in 1969, its submission by the Petitioner, in light of all other facts and circumstances, is strong evidence, if not conclusive evidence, of the parties' intentions relative to their contractual relationship.[41] On this basis alone, this Court should refuse to review the decision of the Court below.

ARGUMENT III

THE REQUEST BY PETITIONER FOR REMAND TO THE COMMISSION FOR EVIDENTIARY HEARINGS IS UNTIMELY AND WOULD SERVE NO USEFUL PURPOSE.

The Petitioner, in a remarkable retreat from the position initially advanced before the Commission and, on brief, before the Court of Appeals below, now seeks reversal and remand of the controversy to the Commission by alleging that the Court below considered facts not part of the record in reversing the Orders of the Com-

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[41] See *Williston, Contracts* § 723 (3 Ed. 1961). Anderson further submits that the execution of the Richmond—I & M contract is strong probative evidence of the intention of the parties to the Anderson—I & M contract. The former contract, of course, was executed *after* the Commission asserted jurisdiction over I & M's wholesale sales.

mission.[42] The Petitioner urges remand for "fact finding" at this late stage of the controversy, notwithstanding that this procedure was never suggested by Petitioner in proceedings before the Commission and that Petitioner actually opposed Commission "fact finding" on brief before the Court below. Petitioner first beat its hasty retreat on the subject of further fact finding during its rebuttal argument before the Court below, its counsel apparently sensing that the panel was incredulous at Petitioner's suggestion that it can, at will, unilaterally cancel or change the terms and conditions of its bulk power supply contracts.

Curiously, the Petitioner relies on Section 313(b) of the Federal Power Act in urging summary reversal and remand to the Commission for further fact finding. Section 313(b) of the Federal Power Act, if relevant at all, would actually preclude Petitioner from raising this issue at this stage of the proceedings:

> . . . No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do . . . If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there was reasonable grounds for failure to adduce such evidence in proceedings before the Commission, the Court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper . . .

At no time herein did the Petitioner "apply to the Court [below] for leave to adduce additional evidence".

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[42] Petition, Point II, at p. 17.

Nor did the Petitioner make any attempt to demonstrate that there is any reasonable ground for its failure to do so. What the Petitioner did do, at the end of oral argument before the Court below, was to abandon the position taken on brief that evidentiary hearings were not needed, and make a frantic request for remand without showing that any "such additional evidence is material." Moreover, in making its belated request for remand, Petitioner wholly failed to inform the Court below what additional evidence it wished to adduce.[43] Under these circumstances, the Court below quite properly ignored the Petitioner's suggestion and proceeded to decide the case on the basis of the record before the Court and Commission which included the contracts in question and all relevant correspondence and background material pertaining to the contracts and the parties' intent with respect thereto.

As has been shown, this information, evidence and material provided more than sufficient evidence for the conclusions reached below by the Court of Appeals and additional "fact finding" would, therefore, be superfluous and an unnecessary burden on all parties to these proceedings.

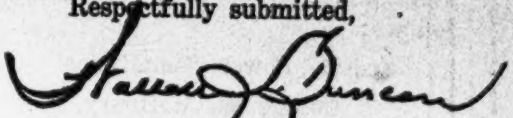
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[43] See Section 313(b) of the Federal Power Act.

CONCLUSION

For each of the foregoing reasons, the Petition for a writ of Certiorari should be denied.

Respectfully submitted,



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October 19, 1973

CERTIFICATE OF SERVICE

I, Wallace L. Duncan, hereby certify that on October 19, 1973, the Brief for Respondent in Opposition in the above-captioned proceeding was served upon counsel by mailing a copy by first class mail, postage prepaid, as follows:

Federal Power Commission

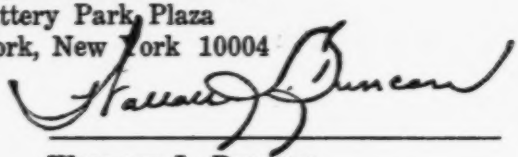
George W. McHenry, Jr.
Acting Solicitor
Federal Power Commission
825 North Capitol Street
Washington, D. C.

Richmond Power & Light of the
City of Richmond, Indiana

George Spiegel
Sandra Strebel
2600 Virginia Avenue, N.W.
Washington, D. C. 20037

Indiana & Michigan Electric Company

Whitney North Seymour
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Counsel for Respondent Anderson Power and Light of the City of Anderson, Indiana

October 19, 1973

APPENDIX A

THIS AGREEMENT entered into this 17th. day of April, 1957 by and between the INDIANA & MICHIGAN ELECTRIC COMPANY, hereafter called the Company, and City of Anderson, by and through its Board of Public Works of Anderson, Indiana successors or assigns, hereafter called the Customer,

WITNESSETH:

For and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto agree with each other as follows:

The Company agrees to furnish to the Customer, during the term of this agreement, and the Customer agrees to take from the Company, subject to its regularly filed standard Terms and Conditions of Service appearing on the following pages, which are hereby incorporated in this agreement, all the electric energy of the character specified herein that shall be purchased by the Customer for its own use and for resale to its customers.

The Company is to furnish and the Customer is to take electric energy under the terms of this agreement for a period of 8 years from the time such service is commenced, and thereafter in successive periods of not less than 2 years each, until either party shall give the other not less than (12 months) notice in writing of its or his election to discontinue the service at the expiration of any of said initial or successive periods.

The electric energy delivered hereunder shall be alternating current at approximately 33,000 volts 3 wire single phase and it shall be delivered at the point where customer's 33,000 volt lines connect with Company's 33,000 volt facilities at Company's Madison Substation, and at Company's Pendleton Substation near Anderson, Indiana, which shall constitute the point of delivery under

this agreement. The said electric energy shall be delivered at reasonably close maintenance to constant potential and frequency and it shall be measured at 33 KV by equipment owned and installed by Company. This metering equipment shall record or register the power delivered to Customer from Company's Madison and Pendleton Substations.

The capacity connected load contracted for by Customer under the tariff named herein is hereby fixed at * _____kva

The Customer hereby agrees to pay the Company monthly for electric energy delivered hereunder at the rate and under the provisions of the regularly filed and published tariff selected by the Customer and known as Tariff I.P. (a copy of which is attached hereto), as long as said tariff is in effect; and in the event said tariff is replaced by a new tariff incorporating higher or lower rates than those stipulated herein, the Company will continue to furnish service as stipulated in the contract and the Customer will pay for such service at the higher or lower rates from and after the date when such rates are made effective. Should the new tariff incorporate higher rates, the Customer has the option of cancelling the contract prior to its expiration date provided notice of cancellation is furnished the Company within 15 days after the first billing date of the higher rates.

If the Customer shall make default in the payment of any bill as aforesaid, or shall violate any of the terms or conditions of this contract, and after such default or violation the Company shall deliver at such premises addressed to the Customer, a written notice of its intention to cut off the supply of electricity on account of said default or violation, then the Company shall have the

* Typed provisions marked Paragraphs A and B attached are a part of this agreement.

right to cut off such supply at the expiration of 5 days after giving such notice unless within such 5 days the Customer shall make good such default or violation. Should the Customer continue in default or violation after service has been discontinued, the Company may continue to withhold the supply of electricity until such time as such default in, or violation of, the terms of this agreement has been made good. Any suspension of service by the Company as provided for herein shall not terminate this contract, and the Customer hereby agrees to pay the guaranteed minimum charge specified herein for the period during which service is suspended, in addition to any arrears which may exist.

There are no understandings or agreements outside of this contract and the same shall be in full force and effect when signed by the parties hereto and approved by the Manager of the Company. This agreement cancels and supersedes all previous agreements relating to the supply of the service described herein.

INDIANA & MICHIGAN ELECTRIC COMPANY

By /s/ Arnold Hogan
Vice President

CITY OF ANDERSON

/s/ Louis E. Eggman
President

/s/ S. S. Bill

/s/ [Illegible]
Board of Public Works

TERMS AND CONDITIONS OF SERVICE

APPLICATION.

A copy of the tariffs and standard terms and conditions under which service is to be rendered to the customer will be furnished upon application at the company's office and the customer may elect upon which tariff applicable to his service his application shall be based.

A written application may be required from each customer, which application, when duly accepted by the company, shall constitute the agreement between the company and the customer. A copy of the application will be furnished the customer upon request.

DEPOSITS.

A deposit may be required of the customer before service will be supplied. The company will pay interest on deposits so made in accordance with statutory requirements. Retention by the company, prior to final settlement, of said deposit is not a payment or part payment of any bill for service. The company shall have a reasonable time in which to read and remove the meters and to ascertain that the obligations of the customer have been fully performed before being required to return any deposit.

PAYMENTS.

Bills will be rendered by the company to the customer monthly in accordance with the tariff selected, applicable to the customer's service. Said bills are made payable in the main or branch offices of the company within the time limit specified by the tariff. Failure to receive bill will not entitle customer to any discount or to the remission of any charge for

nonpayment within the time specified. The word "month" as used herein and in the tariffs is hereby defined to be the elapsed time between two successive meter readings ordinarily about 30 days apart, except that when service at a delivery point is first supplied to a customer or is terminated, a "month" may be an elapsed time between two meter readings of (1) not less than 16 days, nor (2) more than 15 days plus the immediate next reading period. In the event the total elapsed time a customer takes service is less than 30 days said period shall be considered as a "month." In the event of the stoppage or the failure of any meter to register the full amount of current consumed, the customer will be billed for such period on an estimated consumption based upon his use of current in a similar period of like use.

The tariffs of the company are net if the account of the customer is paid within the time limit specified in the tariff applicable to his service. Any one monthly delayed payment charge billed against the customer for non-payment of bill may be remitted, provided the customer's previous accounts are paid in full and provided no delayed payment charge has been remitted under this clause during the preceding 6 months.

INSPECTION.

It is to the interest of the customer to properly install and maintain his wiring and electrical equipment and he shall at all times be responsible for the character and condition thereof. The company makes no inspection thereof and in no event shall be responsible therefor. Before furnishing service the company may require: (1) The customer to furnish a certificate or notice of approval issued by a duly recognized authority, such as the National Board of

Fire Underwriters or any underwriter's inspection bureau or any inspector designated by a municipality served by the company; such certificate being to the effect that the wiring and equipment of the customer have been installed in accordance with the requirements of the National Board of Fire Underwriters, or as fixed by the municipality; or, (2) In lieu of the inspection certificate the delivery by the customer to the company of an agreement, duly signed by the owner and tenant of the premises, authorizing the connection to the wiring system of the customer. Any change in or any additions to the original wiring and equipment of the customer will be subject to the above requirements to insure a continuance of service.

No responsibility shall attach to the company because of any waiver of these requirements.

SERVICE CONNECTIONS FROM OVERHEAD DISTRIBUTION SYSTEMS.

The company will when notified designate the location of its service connection and the customer's wiring must be brought outside the building wall nearest the company's service wires so as to be readily accessible thereto and in such manner that all wiring furnished by the company will be in plain view from the street or alley. The inside wiring must extend at least 18 inches beyond the building for the company to attach its wires thereto, and same must be thoroughly and permanently grounded (to the water supply system if possible), provided the maximum difference of potential between the grounded point and any other point in the circuit does not exceed 150 volts and may be grounded when the maximum difference of potential between the ground-

ed point and any other point in the circuit exceeds 150 volts.

Customers desiring an underground service from overhead wires may, at their expense, run service wires from service equipment in buildings to the pole from which connection is to be made, including the necessary run up the side of the pole.

All connections between the customer's service equipment and the company's service wires must be installed as recommended or required by the National Electric Code.

When a customer desires that energy should be delivered at a point or in a manner other than that specified by the company, a charge will be made equal to the additional cost of same.

SERVICE CONNECTIONS FROM UNDERGROUND DISTRIBUTION SYSTEMS.

Where service is supplied from an underground distribution system the customer shall make arrangements with the company for the company to supply and install a continuous run of cable conductors including necessary ducts from the manhole or connection box to the inside of the building wall. The company will render a charge to customer for the value of a portion of cable and duct so installed by the company, such portion being the cable and duct from the curb line of the street to the terminus of cable inside the building and also for that portion of labor and expense incurred by the company in installing such portion of cable and duct for the customer. Company should be consulted on all installations served from the underground system.

COMPANY'S LIABILITY.

The company will use reasonable diligence in furnishing a regular and uninterrupted supply of energy, but in case such supply should be interrupted or fail by reason of an act of God, the public enemy, accidents, strikes, legal process, State or Municipal interferences, breakdowns or injury to the machinery, transmission lines or distribution lines of the company, or extraordinary repairs, the company shall not be liable for damages: for interruptions occasioned from any other cause the liability of the company shall be limited to 5 times the amount which the customer would have paid for energy during the period of such interruptions.

The company shall not be liable to the customer, however, for any loss, injury or damage resulting from the customer's use of his equipment or from the use of the energy of the company or from the connections of the company's wires with the customer's wires and appliances.

The company will provide and maintain in proper operative condition the necessary line or service connections, transformers (when same are required by conditions of contract between the parties thereto), meters and other apparatus which may be required for the proper measurement of and protection to its service. All such apparatus shall be and remain the property of the company.

CUSTOMER'S LIABILITY.

In the event of loss or injury of the property of the company through misuse by, or the negligence of, the customer or the employees of the same, the cost of the necessary repairs or replacement thereof shall be paid to the company by the customer.

Customers will be held responsible for tampering with, interfering with, or breaking of seals of meters, or other equipment of the company installed on the customer's premises, and will be held liable for same according to law. The customer hereby agrees that no one except the employees of the company shall be allowed to make any internal or external adjustments of any meter or any other piece of apparatus which shall be the property of the company.

The company shall have the right at all reasonable hours to enter the premises of the customer for the purpose of [illegible]lling, reading, removing, testing, replacing or o[illegible]e disposing of its apparatus and property, and t[illegible]ht of entire removal of the company's property [illegible]he event of the termination of the contract for any cause.

EXTENSION OF SERVICE.

A. General Provisions.

The transmission or distribution lines of the company will be extended to such points as provide sufficient load to justify such extensions, or in lieu of sufficient load, the company may require a long-term contract or such definite and written guarantee from a customer, or group of customers, in addition to any minimum payment required by the tariff, as may be necessary. This requirement may also be made covering the payment by the customer of the cost of tapping existing transmission or distribution lines for light or power service or both, when such serivce will not provide sufficient load to justify the cost of tapping said lines.

B. Extensions to Supply Year Round Service to Domestic Customers and Farm Customers.

The company will extend its lines to serve domestic customers and farm customers for year round service under applicable tariffs subject to the following conditions:

1. Extensions hereunder shall be built by the company in accordance with its construction standards and shall be single phase unless the company elects to build polyphase lines.

2. In those cases where it is not feasible or practicable to construct lines on public rights of way and it is necessary to secure rights of way on private property or tree trimming permits, the applicant or applicants shall secure the same without cost to the company or assist the company in obtaining such rights of way on private property or tree trimming permits before construction shall commence.

   The company shall be under no obligation to construct lines in event the necessary rights of way or tree trimming permits cannot be so obtained.

LOCATION AND MAINTENANCE OF COMPANY'S EQUIPMENT.

The company shall have the right, if necessary, to construct its poles, lines and circuits on the property, and to place its transformers and other apparatus on the property or within the buildings, of the customer, at a point or points convenient for such purpose, and the customer shall further guarantee the right to use suitable space for the installation of necessary measuring instruments so that the latter may be protected from injury by the elements or through the negligence or deliberate acts of the customer or of any employee of the same.

When the customer desires delivery of energy at more than one point, a separate contract will be required for each separate point of delivery. Service delivered at each point of delivery will be billed separately under the applicable tariff.

USE OF ENERGY BY CUSTOMER.

The tariffs for electric energy given herein are classified by the character of use of such energy. The use of any devices or apparatus whereby the form of energy supplied by the company is altered for the benefit or convenience of the customer, shall not entitle him to any other tariff than is called for by the ultimate use of the energy supplied. Under this rule customers who may install motor generator sets or other converting equipment for the specific purpose of transforming or converting current from one form to another for lighting purposes, shall not be entitled to power tariffs.

With particular reference to power customers it shall be understood that upon the expiration of a contract the customer may elect to renew contract upon the same or another tariff published by the company available in the district in which the customer may reside or operate, and applicable to the customer's requirements, except that in no case shall the company be required to maintain transmission, switching or transformation equipment (either for voltage or form of current change) different from or in addition to that generally furnished to other customers receiving electrical supply under the terms of the tariff elected by the customer.

A customer may not change from one tariff to another during the term of contract except by mutual agreement.

The service connections, transformers, meters and appliances supplied by the company for each customer have a definite capacity and no additions to the equipment, or load connected thereto, will be allowed except by consent of the company.

The customer shall install only motors, apparatus or appliances which are suitable for operation with the character of the service supplied by the company, and which shall not be detrimental to same, and the electric power must not be used in such a manner as to cause unprovided for voltage fluctuations or disturbances in the company's transmission or distribution system. The company shall be the sole judge as to the suitability of apparatus or appliances to be connected to its lines, and also as to whether the operation of such apparatus or appliances will be detrimental to its general service.

No radio, wireless telegraph or wireless telephone antennae may be connected to the company's lines, poles, crossarms, structures, or other facilities.

All apparatus used by the customer shall be of such type as to secure the highest practicable commercial efficiency, power factor and the proper balancing of phases. Motors which are frequently started, or motors arranged for automatic control, must be of a type to give maximum starting torque with minimum current flow, and must be of a type, and equipped with controlling devices, approved by the company. In case of violation of this rule, service may be discontinued by the company until such time as the customer's use of the electric energy furnished hereunder shall conform to these regualtions. Such suspension of service by the company shall not operate as a cancellation of the contract. The customer agrees to notify the company of any increase or decrease in his connected load.

The The company will not supply service to customers who have other sources of energy supply except under tariffs which specifically provide for same.

POWER FACTOR OF LIGHTING EQUIPMENT.

When neon, fluorescent, or other types of lighting equipment having similar power factor characteristics are installed after August 20, 1940, the customer shall furnish, install and maintain at his own expense, corrective apparatus designed to increase the power factor of the individual units or the entire group of such units to not less than 90% lagging.

Where old equipment, including signs, is moved to a new location, it will, under this paragraph, be considered as a new installation.

PARAGRAPH A

It is agreed that the maximum demand established on the City system, as of the date of this Agreement, is 34,000 kva, and that the generating capability of the City's plant, with the largest unit shut down, is 11,250 kva. The initial contract capacity is therefore established at 22,750 kva, the difference between these two figures. The parties agree that in January 1957 and in each succeeding January the City will advise Company in writing of the maximum demand established on the City system during the preceding calendar year and the parties shall determine the generating capability of the City plant at the end of the preceding calendar year with the largest unit shut down, and that the existing contract capacity shall be adjusted upward to a figure equal to the difference between the said maximum demand and the said generating capability adjusted to the nearest 100 kva.

The Company agrees that in time of emergency or on request of City that Company will furnish capacity over and above that constructed for on the following basis:

A. If Company has capacity available to meet the increased requirements of City from its own system over and above the requirements of its other customers, Company will furnish such capacity at the rate set forth herein.

B. If Company does not have capacity available on its own system, but is able to purchase the same from other companies with whom it is interconnected, it will furnish such additional capacity to the City on the City's request, if the City will reimburse the Company for its extra costs, including losses and purchasing the said capacity, plus 10% thereof for administration expenses.

PARAGRAPH B

The customer has developed engineering studies and plans to construct during 1957 and thereafter maintain necessary 33,000 volt lines so that service supplied from Company's Madison and Pendleton Substations shall be to a single distribution system connected together electrically by customer's lines.

INDIANA & MICHIGAN ELECTRIC COMPANY

(See Sheet No. 2 for Applicability)

3rd Revised Sheet No. 8
Cancels
2nd Revised Sheet No. 8
P.S.C.I. No. E-3

TARIFF I. P.

(Industrial Power)

AVAILABILITY OF SERVICE.

Available for power service to customers, whose plants are located adjacent to existing transmission or distribution lines operating at 27,600 volts or over and having capacity sufficient to meet the customer's requirements.

The customer shall contract for a definite amount of electrical capacity which shall be sufficient to meet normal maximum requirements but not less than 10,000 kilovolt-amperes nor more than 60,000 kva, and the company shall not be required to supply capacity in excess of that contracted for except by mutual agreement.

RATE.

PRIMARY PORTION:

For the first 15,000 kva of monthly billing demand as determined below	$2.625 per kva
For all over 15,000 kva of monthly billing demand	$2.275 " "

The customer shall be allowed 242 kwhrs for each kva of monthly billing demand billed in accordance with this section.

SECONDARY PORTION:

Energy in excess of 242 kwhrs per kva of monthly billing demand	$0.0049 per kwhr

RATE ADJUSTMENT.

In any monthly period when metered kwhrs, corrected for power factor, are less than 242 kwhrs per kva of monthly billing demand, the customer shall receive a fuel cost credit on such deficiency in kwhrs at the fuel cost per kwhr (computed from factors contained in Fuel Clause) corresponding to the base price of fuel set forth in Fuel Clause.

MINIMUM CHARGE.

This tariff is subject to a minimum monthly charge equal to the primary portion of the rate set forth above, for each plant. The minimum monthly charge so determined shall be subject to adjustments as determined under the Rate Adjustment and the Fuel Clause.

PAYMENT.

Bills computed under this tariff are due and payable within 15 days of date of bill. If customer should not make payment within 30 days of date of bill, company may suspend delivery of energy until all bills, with interest thereon at the rate of 6% per annum from the date thereof to the date of payment of said bills, have been paid.

FUEL CLAUSE.

This rate is based upon the weighted average cost of fuel consumed by Indiana & Michigan Electric Company at the Breed, Tanners Creek and Twin Branch generating stations.

If during any monthly period the weighted average cost is above the base price of 20.5 cents per 1,000,000 BTU by at least .5 cent, an additional charge during the second month thereafter will be

made on the kwhrs adjusted for billing purposes used during said second month at .00525 cent per kwhr for each full .5 cent increase in the cost of fuel above 20.5 cents per 1,000,000 BTU.

If during any monthly period such weighted average cost is less than the base price of 20.5 cents per 1,000,000 BTU, the bill rendered to the customer for the second succeeding month shall be decreased by an amount equal to the kwhrs adjusted for billing purposes used during said second month at .00525 cent per kwhr if the cost of fuel is in the range 20.00—20.49 cents per 1,000,000 BTU, by twice .00525 cent per kwhr if the cost of fuel is in the range 19.50—19.99 cents per 1,000,000 BTU, etc.

Until such time as the Company's Breed generating station goes into service, the base price of fuel under this clause will be taken as 23.0 cents instead of 20.5 cents as stated above.

Issued by

R. E. DOYLE, JR., Vice President and General Manager
Fort Wayne, Indiana

Issued Effective

INDIANA & MICHIGAN ELECTRIC COMPANY

(See Sheet No. 2 for Applicability)

1st Revised Sheet No. 8A
Cancels
Original Sheet No. 8A
P.S.C.I. No. E-3

TARIFF I. P. (Cont'd.)

(Industrial Power)

MONTHLY BILLING DEMAND.

The billing demand in kva for each plant shall be taken each month as the single highest 30-minute integrated peak in kva, as registered at such plant during the month by a demand meter or indicator, but the monthly billing demand so established shall, in no event, be less than 60% of the contract capacity of the customer at such plant, nor less than 10,000 kva in any month.

DELIVERY VOLTAGE.

The customer shall own, operate and maintain all necessary substations and appurtenances thereto for receiving and purchasing all electric energy at transmission or distribution voltage of not less than 27,600 volts. The company will, however, install, own, operate and maintain necessary metering equipment.

POWER FACTOR.

The rate set forth herein for each plant is based upon the maintenance by the customer of an average monthly power factor of 85%, leading or lagging, as shown by integrating instruments. When the average monthly power factor is above or below

85%, the kwhrs as metered will, for billing purposes, be multiplied by the following constants:

Effective Monthly Power Factor	Constant	Effective Monthly Power Factor	Constant
1.00	.951	.70	1.0835
.95	.965	.65	1.1255
.90	.981	.60	1.1785
.85	1.000	.55	1.2455
.80	1.023	.50	1.3335
.75	1.050		

Constants for other than the effective power factors given in the foregoing table will be determined from the same formula used to determine the given constants.

TERM OF CONTRACT.

Contracts under this tariff will be made for a term of years taking into consideration the size of the load, the location of the load, and the amount of facilities to be furnished by the company in serving the load, but contracts will not be made for initial periods of less than 3 years with self-renewal provisions for successive periods of at least 2 years each. Contracts may be cancelled or reduced in capacity by either party at the end of initial or renewal periods on a minimum of 12 months' prior written notice to the other party.

SPECIAL TERMS AND CONDITIONS.

See Sheets No. 3, 3A, 3B, 3C and 3D for Terms and Conditions of Service.

This tariff is available to customers having other sources of energy supply.

A customer's plant is considered as one or more buildings which are served by a single electrical

distribution system provided and operated by customer. When the size of the customer's load necessitates the delivery of energy to the customer's plant over more than one circuit the company may elect to connect its circuits to different points on the customer's system irrespective of contrary provisions in Terms and Conditions of Service.

This tariff is available to legitimate electric public utilities.

Issued by

C. V. SORENSON, Vice President and General Manager
Fort Wayne, Indiana

Issued September 15, 1954 Effective September 15, 1954

APPENDIX B

January 2, 1963

Mr. Louis E. Eggman, President
Board of Public Works
City of Anderson
Anderson, Indiana

Dear Mr. Eggman:

In 1961 representatives of the City of Anderson and the Indiana & Michigan Electric Company joined together, at your request, to study changes that could be made to improve performance of your generating plant and its coordination with purchase power source. This study showed that by operating only Unit #4 substantial economies can be made by the City. It was suggested that Unit #4 be rehabilitated so that it could be operated at design conditions to achieve the maximum possible efficiency and have available its full capability of 12,500 KVA. The rebuilding of Unit #4 and associated changes in Boiler #7 have now been completed.

You wanted to be assured that the City would have a stable supply of power to meet present day needs and also be in a position to supply any new industry which would make job opportunities for Anderson citizens. Accordingly I & M would be expected to have additional capacity available to Anderson when needed.

In order that the City have all the power required for growth and development at the lowest possible rate, it will be necessary to amend the present agreement between the City of Anderson and the Indiana & Michigan Electric Company, which would accomplish the following:

A. Allow the City to operate the generating plant so as to use only lowest cost fuel both for electric generating and for steam heating service.

B. Revise the contract so as to give the City increased flexibility in scheduling plant operation so as to enable City to realize the lowest generating cost and lower over-all cost for power.

C. Give the City a source of maintenance in the event of an emergency breakdown of City's #4 Unit.

D. I & M to be required to furnish additional capacity as needed by the City.

E. Assure the City of a long range supply of power at reasonable rates subject to approval by the Public Service Commission of Indiana.

Accordingly the following revisions to the agreement dated April 17, 1957 are submitted for your concurrence.

1. Paragraph "A" of the agreement be revised to read as follows:

Paragraph A—Contract Capacity

The Contract Capacity for the initial year of the agreement is hereby set at 31,500 KVA. The Contract Capacity in each succeeding year of this agreement shall be the difference between the maximum 30-minute KVA demand on Customer's electric system during the preceding year and 12,500 KVA.

2. A new Paragraph "C" be added as follows:

Paragraph C—Maintenance Power

In addition to the capacity and energy contracted for under Tariff I.P. the Company agrees to provide Maintenance Power, during any periods

when Customer requires maintenance, repair or overhaul of its 10,000 KW (12,500 KVA) generator and/or other power plant equipment associated with that generator, in accordance with the following. Maintenance Power shall be delivered to Customer in amounts and during periods acceptable to both parties, but the amount of such power is not to exceed 10,000 KW (12,500 KVA). The Operating Committee, provided for under Paragraph D, shall determine and agree on the specific amount of Maintenance Power and Maintenance Energy delivered to Customer and the Maintenance Periods during which such amounts are so delivered.

Maintenance Energy during any billing period shall be the number of kilowatthours equal to the product of 0.5 and the sum of the Maintenance Demands (KW) for all 30-minute intervals in which Company is delivering Maintenance Power. Maintenance Demand (KW) as used above is defined as the difference between Customer's registered demand (KW) on Company in any 30-minute interval in which Maintenance Power is supplied and the KW demand that is then being supplied under the provisions of Tariff I.P., provided that such Maintenance Demand shall in no event exceed 10,000 KW.

Customer shall pay for Maintenance Energy at a rate per kilowatthour equal to the cost for energy so furnished, plus 20% thereof, but in no event shall the rate be less than 8 mills per kilowatthour. Such cost will include the total cost to acquire or produce the energy, plus an appropriate adjustment for transmission losses incurred in transmitting the energy to the delivery point.

8. A new Paragraph "D" be added as follows:

Paragraph D—Operating Committee

To coordinate the operating of their respective facilities and in order to carry out the terms of this agreement, the parties shall appoint a committee of authorized representatives to be known as the "Operating Committee".

Each of the parties shall designate in writing delivered to the other party the person who is to act as its representative on said committee (and the person or persons who may serve as alternate whenever such representative is unable to act). Such representative and alternate or alternates shall each be persons familiar with the generating, transmission, and substation facilities of the system of such party by which it has been so designated, and each shall be fully authorized to cooperate with the other representative (or alternates). Such representatives (or alternates) shall, subject to the declared intentions of the parties herein set forth and to the terms hereof and the terms of any other agreement subsequently arrived at between the parties, be fully authorized to cooperate and agree upon all matters relative to this agreement which are not specifically provided for herein.

4. The initial term of the agreement shall be extended for a 5 year period and will thereafter be renewed automatically in 2 successive periods of 5 years each unless either party shall give the other not less than 24 months notice in writing of its election to discontinue the service at the expiration of any such 5 year periods.

Except as expressly modified by this supplemental agreement the terms and conditions of the Agreement

dated April 17, 1957 shall be and remain in full force in effect.

If you concur with the aforementioned revisions, please have this Supplemental Agreement executed and approved by the duly authorized officials of the City of Anderson, Indiana.

Yours very truly,

INDIANA & MICHIGAN ELECTRIC COMPANY

/s/ R. E. Doyle, Jr.
R. E. DOYLE, JR.
Vice President and
General Manager

RMK:ljs

Acceptance by Board of Public Works

CITY OF ANDERSON

By /s/ Louis E. Eggman, Pres.

/s/ S. S. Bill

/s/ [Illegible]

Dated: December 11, 1963

Approved by Mayor

CITY OF ANDERSON

By /s/ Ralph R. Ferguson
RALPH R. FERGUSON

Dated: December 11, 1963

APPENDIX C

INDIANA & MICHIGAN ELECTRIC COMPANY
419 North Walnut Street—Muncie, Indiana 47305

[SEAL]

September 30, 1969

Mr. Frank Yarling,
Anderson Municipal Light and Power,
Anderson, Indiana 46011.

Dear Mr. Yarling:

The present contract, dated April 17, 1957, between the City of Anderson and Indiana & Michigan Electric Company, covering electric service to the City of Anderson, is based on a contract capacity of 22,750 KVA. This contract capacity was increased to 30,250 KVA in 1962, to 36,750 KVA in 1963, and to 56,750 KVA on December 31, 1966. According to our billing records, your maximum demand has now reached 80,800 KVA.

As discussed in recent conversations, it appears appropriate to enter into a new contract agreement since many of the provisions outlined in the old agreement are obsolete and are no longer required. We are sure you will agree that a more realistic contract capacity for your facilities, based on your present requirement and foreseeable load growth, should be decided upon.

A copy of a new agreement is attached for your consideration and approval. It is based on our Industrial Power Tariff (I.P.) and indicates a contract capacity of 77,000 KVA, and will become effective January 1, 1970.

If this new agreement is acceptable to you, would you please have it properly executed by the Board of

Public Works and return both copies to the writer. The date, at the top of the agreement, will be completed when the contract is accepted and signed by our management.

If you have any questions regarding this new agreement, please call the writer.

Yours, very truly,
/s/ C. Wayne Roahrig
C. WAYNE ROAHRIG

CWR:AC
Enc.

APPENDIX "A" TO AGREEMENT DATED ——— ——— BY AND BETWEEN INDIANA & MICHIGAN ELECTRIC COMPANY AND CITY OF ANDERSON:

PARAGRAPH "A"

The contract capacity hereby reserved and contracted for by the customer for the first three (3) years of the term of this Agreement is hereby fixed at 77,000 KVA. Thereafter, on the successive two (2) years' anniversary date of the Agreement, as so stated in Tariff I.P. that the customer takes service under this Agreement, the contract capacity shall automatically be adjusted to be the equivalent to the customer's normal maximum requirements as represented by the single highest 30-minute integrated peak in KVA during any month in the next preceding year, adjusted to the nearest 100 KVA; provided, however, that the contract capacity in any year shall in no event be less than 77,000 KVA.

PARAGRAPH "B"

This agreement cancels and supersedes Agreement dated April 17, 1957, between Indiana & Michigan Electric Company and City of Anderson for supplying electric service to the City of Anderson.

THIS AGREEMENT * entered into this _____ _____ day of _____ by and between the INDIANA & MICHIGAN ELECTRIC COMPANY, hereafter called the Company, and City of Anderson, by and through its Board of Public Works Anderson, Indiana, or his or its heirs, successors or assigns, hereafter called the Customer,

WITNESSETH:

For and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto agree with each other as follows:

The Company agrees to furnish to the Customer, during the term of this Agreement, and the Customer agrees to take from the Company, subject to Company's standard Terms and Conditions of Service as regularly filed with the Public Service Commission of Indiana, all the electric energy of the character specified herein that shall be purchased by the Customer for its own use and for resale to its customers.

The Company is to furnish and the Customer is to take electric energy under the terms of this Agreement for a period of three (3) years from the time such service is commenced, and thereafter in successive periods of not less than two (2) years each, until either party shall give the other not less than 12 months' notice in writing of his or its election to discontinue the service at the expiration of any of said periods. The date that service shall be deemed to have commenced under this Agreement shall be January 1, 1970.

The electric energy delivered hereunder shall be alternating current at approximately 34,500 volts 3 wire

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* Including Appendix "A" attached on the reverse side hereof and made a part hereof.

single phase and it shall be delivered at the point where customer's 33,000 volt lines connect with Company's 33,000 volt facilities at Company's Madison Substation and at Company's Pendleton Substation near Anderson, Indiana which shall constitute the point of delivery under this Agreement. The said electric energy shall be delivered at reasonably close maintenance to constant potential and frequency and it shall be measured by a meter or meters owned and installed by the Company and located at the Company's Madison & Pendleton Substations. This 34 KV metering equipment shall record or register the power delivered to customer.

The reservation of capacity contracted for by Customer under the tariff named herein is hereby fixed at 77,000 kva.

The Customer hereby agrees to pay the Company monthly for electric energy delivered hereunder at the rate and under the provisions of Company's Tariff I.P. as regularly filed with the Public Service Commission of Indiana, said tariff being selected by the Customer, as long as said tariff is in effect; and in the event said tariff is replaced by a new or revised tariff incorporating higher or lower rates than those stipulated in the aforementioned tariff, the Company will continue to furnish service as stipulated in the Agreement and the Customer will pay for such service at the higher or lower rates from and after the date when such rates are made effective. Should the new or revised tariff incorporate higher rates, the Customer shall have the option of cancelling the Agreement prior to its expiration date provided notice of cancellation is furnished the Company within 15 days after the first billing date at the higher rates.

There are no unwritten understandings or agreements relating to the service hereinabove provided.

This Agreement cancels and supersedes all previous agreements relating to the purchase by Customer and sale by Company of electric energy at Customer's premises as referred to above.

This Agreement shall be in full force and effect when signed by the authorized representatives of the parties hereto.

INDIANA & MICHIGAN ELECTRIC COMPANY

By CITY OF ANDERSON

LIBRARY
SUPREME COURT, U. S.

No. 73-511

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

INDIANA AND MICHIGAN ELECTRIC COMPANY,
PETITIONER

v.

ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA; RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA; AND FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

LEO E. FORQUER,
General Counsel,
GEORGE W. MCHENRY, JR.,
Solicitor,
JOHN R. STAFFIER,
Attorney,
Federal Power Commission,
Washington, D.C. 20426.

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MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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1. Petitioner seeks review of the decision of the court of appeals in this case (Pet. App. 1a-23a) reversing orders of the Federal Power Commission (Pet. App. 28a-49a) in which the Commission, pursuant to Section 205 of the Federal Power Act, 16 U.S.C. 824d, accepted for filing and suspended for five months revised tariff sheets submitted by petitioner. These revised tariff sheets increased the rates at which petitioner sells electricity on a wholesale basis to several of its jurisdictional customers, including respondents Anderson Power and Light of the City of Anderson, Indiana (Anderson) and Richmond Power and Light of the City of Richmond, Indiana (Richmond).

At the time the revised sheets were tendered to the Commission for filing, respondents Anderson and Richmond intervened and filed motions to reject the filing. They claimed that their contracts with petitioner did not permit unilateral rate increases and that the filing should therefore be rejected under this Court's decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 322, and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348.[1] The Commission denied these motions on the ground that the contracts in question were not fixed-rate contracts (Pet. App. 35a).

Both Anderson and Richmond applied for rehearing of the Commission's decision, again asserting that petitioner's filing was barred by contract. They relied upon contractual language that ties their rates to the rates set forth in petitioner's "Tariff I.P."[2] on file with the Indiana Public Service Commission, and they argued that this language prohibits petitioner from raising their rates above those established in the currently effective Tariff I.P. The Commission denied rehearing (Pet. App. 39a-40a). It stated (Pet. App. 40a):

> This Commission has exclusive jurisdiction over I & M's wholesale sales to Anderson and R P & L, and I & M is obligated to charge those rates which

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[1] Motions to reject on contractual grounds were also filed by several of petitioner's rural electric cooperative customers who were affected by the new rate filing. These customers instituted separate proceedings to review the Commission's action in this matter, which are currently pending *sub nom. Indiana Statewide Rural Electric Cooperative, Inc.* v. *Federal Power Commission*, C.A. D.C., No. 72-2148, filed December 1, 1972.

[2] Petitioner serves several retail industrial customers in Indiana under Tariff I.P.

> are on file with this Commission. This Commission's jurisdiction cannot be * * * limited or avoided by private contract. * * * For service subject to this Commission's jurisdiction, the Tariff I.P. on file with the Indiana Public Service Commission is not applicable. We find that the contracts do not preclude the filing of Rate Schedule WS to supersede Tariff I.P. on file with this Commission.

On petitions for review, the court of appeals concluded that petitioner's filing was inconsistent with its contracts with Anderson and Richmond and thus should have been rejected by the Commission under *Mobile* and *Sierra*. Accordingly, the court remanded the case to the Commission with directions to reject the filing and to take appropriate action to secure refunds of the incremental amounts paid by Anderson and Richmond since the time the new tariff sheets had been erroneously allowed to become effective (Pet. App. 23a).

The court recognized that neither of the contracts here prohibited unilateral rate increases (Pet. App. 8a-9a, 19a-20a). As to Richmond, however, the court reasoned that, since the contract was entered into at a time when both parties were aware of federal jurisdiction over the sale, the term tying the rate to that in Tariff I.P. represented an intent by the parties that petitioner's right to file increases be limited only to those increases necessary to keep Richmond's rate identical to that in Tariff I.P. (Pet. App. 14a-15a). Citing this Court's decisions in *Mobile*, *Sierra*, and *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, the court found that this "contractual undertaking" was as "deserving of protection under the Act" as "one for a single fixed rate" (Pet. App. 15a).

As to Anderson, the court reasoned that, since the contract was entered into when both parties assumed that only the State had jurisdiction over the sale, the parties must have contemplated rate increases only in accordance with Indiana law (Pet. App. 19a-20a). Under that law, a rate increase cannot become effective until approved by the Indiana Public Service Commission after formal hearing. The court concluded that the contract should therefore be read to prohibit petitioner from increasing its rate unilaterally simply by filing a new tariff as it had done here (Pet. App. 21a-22a).

The court found support for its interpretation of the contracts in Richmond's "plausible explanation" (Pet. App. 12a) of why the parties had agreed to link their rates to those approved by the Indiana Public Service Commission under Tariff I.P. Since both Anderson and Richmond compete with petitioner for industrial customers, and since Tariff I.P. governs petitioner's rates to some of its retail industrial customers, keying the rates to those in Tariff I.P. would permit Anderson and Richmond to offer to industrial customers rates that would be competitive with those offered directly by petitioner (Pet. App. 12a-13a, 22a).

2. The Commission agrees generally with petitioner that the court of appeals erred in substituting its interpretation of the contracts for that of the Commission. The result—which could hardly have been contemplated by the parties to the contracts—is that the Indiana Public Service Commission in effect has authority to regulate sales of electricity which, under the Federal Power Act, are committed to the exclusive regulatory jurisdiction of the Federal Power Commission.

The only issue in this case, however, concerns the correct interpretation of the particular language in the two contracts, and that issue is not of sufficient general importance to warrant review by this Court. The decision below will not, in the Commission's judgment, seriously interfere with the performance of its regulatory responsibilities under the Federal Power Act. As the court below recognized (Pet. App. 15-16), the Commission remains free to initiate a proceeding under Section 206(a) of the Act, 16 U.S.C. 824e(a), to determine whether the rates under the contracts—*i.e.*, the rates under Tariff I.P.—are "unjust, unreasonable, unduly discriminatory or preferential * * *." If the Commission so determines, it may by order fix "just and reasonable" rates for the sales.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

LEO E. FORQUER,
General Counsel,
GEORGE W. MCHENRY, JR.,
Solicitor,
JOHN R. STAFFIER,
Attorney,
Federal Power Commission.

NOVEMBER 1973.